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In The

Supreme Court of the United States

October Term, 1997

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, S. DAVID BERST and ROBERT L. STROUP, III,

Petitioners,

vs.

JERRY TARKANIAN and LOIS TARKANIAN,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Nevada

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a defendant in a civil case has a fundamental due process right to an impartial factfinder?

2. Whether an appellate court has a duty to make an independent, *de novo* evaluation of the circumstances underlying a defendant's motion for change of venue when the fundamental constitutional right to an impartial factfinder is implicated?

3. Whether, based upon an independent evaluation of the circumstances in this case, proceeding to trial in Clark County, Nevada will violate defendants' fundamental constitutional right to an impartial factfinder?

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OPINIONS BELOW

This litigation has a long history with which this Court is already familiar. In the most recent case, Jerry and Lois Tarkanian filed suit in 1992 in Clark County, Nevada against the National Collegiate Athletic Association ("NCAA") and certain of its current and former officers and employees, S. David Berst, Robert L. Stroup III and Walter S. Byers. The trial court's oral ruling denying both the defendants' request for a change of venue and an evidentiary hearing on whether the defendants can receive an impartial trial in Clark County, Nevada is unreported. (App. D, *infra*). The Supreme Court of Nevada's decision, holding that the trial court ruling did not constitute an abuse of discretion, is reported at 939 P.2d 1049 (1997). (App. A, *infra*).

JURISDICTION

The decision of the Supreme Court of Nevada was entered on May 22, 1997. Petitioners' timely petition for rehearing was denied on July 16, 1997. (App. B, *infra*). The petition for a writ of certiorari was filed within 90 days of that decision. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

Under Nevada law, this is the Petitioners' only opportunity to petition this Court to review the change of venue issue. See Nev. Sup. Ct. R. App. Pro. 3A(b)(4) (a party must appeal an order refusing to change the place of trial within thirty days or there shall be no appeal therefrom). Therefore, the Court should treat the Supreme Court of Nevada decision as a "final judgment" for purposes of 28 U.S.C. § 1257(a) even though the ruling

at issue here does not finally dispose of the litigation. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (in certain cases, immediate review under 28 U.S.C. § 1257(a) of state supreme court judgments where there are further proceedings is the best way to avoid "the mischief of economic waste and of delayed justice"). In this case, just as in *Mercantile National Bank at Dallas v. Langdeau*, 371 U.S. 555 (1963), the Supreme Court of Nevada's decision is final because the Petitioners' change of venue motion is separate and independent from the merits, the community bias issue is preliminary to reaching the merits, the venue issue is not enmeshed or intertwined with the factual or legal issues comprising the Tarkanians' cause of action, and the issue is effectively unreviewable after a trial on the merits. Thus, the Supreme Court of Nevada decision is ripe for review under § 1257(a) because there is no other way for defendants NCAA, Berst and Stroup to preserve their constitutional claims to a fair and impartial factfinder.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV to the United States Constitution states, in relevant part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF CASE

In 1992, Jerry Tarkanian and his wife, Lois Tarkanian, brought this lawsuit against the NCAA and certain NCAA employees, alleging several state law tort claims

based on the assertion that the NCAA improperly attempted to force Tarkanian out of college coaching during the two decades between 1972 and 1992. The NCAA sought a change of venue from Clark County, Nevada (Las Vegas) as the evidence showed bias in favor of Tarkanian and prejudice against the NCAA, but that request was denied. The evidence included scientific public opinion surveys and media content analyses, which verified that such bias and prejudice permeates the Clark County community. The depth and magnitude of the bias and prejudice are the result of the community's twenty-five year love affair with Tarkanian. The prejudice against the NCAA is the result of Tarkanian's skirmishes with the rules governing the eligibility and financial aid of his student-athletes.

The NCAA is a private, voluntary, unincorporated association whose membership includes 933 public and private colleges and universities throughout the United States. The NCAA offices are located in Overland Park, Kansas. As an association with members in every state, it is subject to suit in the courts of every state.

NCAA staff members provide technical, investigative and administrative support to various NCAA committees which are comprised solely of volunteer representatives from member institutions and conference offices. S. David Berst, a resident of Fairway, Kansas, is employed by the NCAA as its Group Executive Director for Enforcement and Student Athlete Reinstatement. Robert L. Stroup, III, a resident of North Dakota, was employed by

the NCAA from 1987 to 1992 as an enforcement representative.[1]

Jerry Tarkanian was the head basketball coach at California State University at Long Beach ("CSULB") between 1968 and 1973 and at the University of Nevada Las Vegas ("UNLV") between 1973 and 1992. Under Tarkanian, the UNLV basketball team amassed an impressive 509-105 record and was invited to the NCAA tournament twelve out of nineteen years. In 1990, the Rebels won the NCAA Championship and as described by the Tarkanians in their Complaint, "delivered to Las Vegas the most cherished college basketball award – the NCAA national championship title." The following year, the Rebels were undefeated until losing to Duke University in the semifinals of the Final Four. When Tarkanian resigned in 1992 he had the highest winning percentage of any active or former college basketball coach and was a folk hero in Las Vegas. Despite a coaching stint in the NBA and his current position at Fresno State University, Tarkanian retains his celebrity stature in Las Vegas.

In 1973, a five person committee of representatives from different member institutions (the NCAA Committee on Infractions) found CSULB's men's basketball program under Tarkanian to have been guilty of flagrant

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[1] Petitioners, The National Collegiate Athletic Association, S. David Berst and Robert L. Stroup, III will be hereinafter referred to collectively as "NCAA". Although Walter Byers, the Executive Director of the NCAA from 1951 until 1987, was a defendant, the Nevada Supreme Court ordered him dismissed for lack of personal jurisdiction. *Tarkanian v. NCAA*, Docket No. 24770 (February 26, 1997) (unreported).

infractions of NCAA rules regarding admissions, recruiting, eligibility and financial aid. Again in 1977, this Committee found Tarkanian's program at UNLV was violating the same NCAA rules. The Committee reduced the number of men's basketball scholarships and prohibited the team from appearing on television and in the NCAA's post-season tournament for two years. The Committee also directed UNLV to show cause why Tarkanian should not be suspended for two years from coaching. After an unsuccessful appeal to the NCAA's Council, UNLV notified Tarkanian that he was suspended from his coaching duties for a period of two years.

On September 8, 1977, the effective date of the suspension, Jerry Tarkanian filed suit against UNLV in the Eighth Judicial Circuit Court, Clark County, Nevada to enjoin it from suspending him from coaching. Although the NCAA was not a party to the litigation and did not present evidence, the court issued a permanent injunction against UNLV and anyone acting in concert with it from interfering with Tarkanian's coaching at UNLV. On appeal, the Supreme Court of Nevada reversed for failure to join an indispensable party, the NCAA. *University of Nevada v. Tarkanian*, 594 P.2d 1159 (Nev. 1979).

In July 1979, Tarkanian amended his lawsuit to include the NCAA as a defendant. Tarkanian claimed defendant Berst led a vendetta to run Tarkanian out of coaching and to destroy his image. Tarkanian sought injunctive relief under 42 U.S.C. § 1983 on the ground that UNLV and the NCAA had deprived him of due process of law in violation of the Fourteenth Amendment. After a two-week bench trial, the state district court found that the NCAA and UNLV were state actors and

had deprived Tarkanian of liberty and property interests without due process of law.

After the Supreme Court of Nevada affirmed that judgment, *Tarkanian v. NCAA*, 741 P.2d 1345 (Nev. 1987), the NCAA sought and obtained review in this Court.[2] In 1988, the Court ruled that the NCAA was not a state actor for purposes of the Fourteenth Amendment. *NCAA v. Tarkanian*, 488 U.S. 179 (1988). After consulting with UNLV, against whom Tarkanian's injunction remained in effect, and Tarkanian, the NCAA Committee on Infractions offered UNLV two alternative sanctions to the suspension of Tarkanian. UNLV and Tarkanian elected that the team be banned from both live television and the NCAA tournament during the 1991-1992 season.

In April 1991, after the NCAA had begun investigating new allegations of wrongdoing in UNLV's men's basketball program, Nevada enacted legislation requiring national athletic associations such as the NCAA to provide certain procedural due process protections in enforcement proceedings against Nevada colleges and universities. Tarkanian demanded that the NCAA, in its current investigation into allegations regarding UNLV and Tarkanian, comply with the Nevada statute. The NCAA filed a federal action for declaratory relief and,

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[2] The NCAA petition for a writ of certiorari presented five questions and this court granted certiorari on only one question: Whether the action of the NCAA in directing one of its members, a state university, to show cause why it should not temporarily suspend an employee from his duties relating to intercollegiate athletics for violating the Association's rules, constitutes state action, where the member university, in compliance with NCAA rules, suspends the coach from coaching.

ultimately, the U.S. Court of Appeals for the Ninth Circuit affirmed the lower court's ruling that the Nevada statute violated dormant Commerce Clause principles. *National Collegiate Athletic Association v. Miller*, 10 F.3d 633 (9th Cir. 1994), *cert. denied*, 511 U.S. 1033 (1994).

Jerry Tarkanian resigned from his coaching position with UNLV in 1992. Subsequently, Tarkanian and his wife, Lois Tarkanian, filed the present case in state court in Las Vegas, Clark County, Nevada. The Tarkanians' state law tort claims are largely based upon the same facts and circumstances that gave rise to Tarkanian's 1977 lawsuit.

For the past twenty-five years, the litigation between Tarkanian, UNLV, and the NCAA has been the focus of extensive media and public attention in Las Vegas. In order to gauge the impact of this prolific attention on the sentiment of the jury pool of Clark County, the NCAA, through nationally-recognized experts, conducted public opinion surveys and media coverage analyses in Las Vegas, Clark County and, for comparison, Reno, Washoe County, Nevada. Based upon the disconcerting results of these surveys and analyses – which showed the existence of an unprecedented local prejudice deeply embedded into the consciousness of the community of Clark County, Nevada in favor of the Tarkanians and against the NCAA – the NCAA filed a motion for change of venue and requested an evidentiary hearing. The trial court summarily rejected both requests. (App. D, *infra*).

Dr. Kent L. Tedin, who conducted the public opinion surveys for the NCAA, is one of the foremost experts in public opinion surveys. He is the co-author of the best-

selling textbook on public opinion, *American Public Opinion: Its Origins, Content and Impact* (5th Ed. New York: Allyn-Bacon, 1995), and has conducted over 150 public opinion surveys including one in the Oklahoma City bombing case. His public opinion survey validated the obvious. Jerry Tarkanian is a folk hero and celebrity in Clark County:[3]

1. Four years after resigning as UNLV's head basketball coach, Jerry Tarkanian is the most recognized and well-liked person in the Las Vegas community.

2. Seventy-six percent of Clark County citizens followed the media coverage regarding the dispute between Tarkanian and the NCAA.

3. Fifty-eight percent of Clark County citizens want Jerry Tarkanian to prevail in this lawsuit as compared to 9% who want the NCAA to prevail.[4]

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[3] The participants in Tedin's public survey had the same characteristics as jury candidates, i.e., they were adult citizens over the age of 18, who hold a current Nevada driver's license, have a telephone, and live within the specific jurisdictions of the district courts in Clark County and Washoe County. Four hundred randomly-selected adults from each county were surveyed.

[4] In contrast, the survey data from Washoe County, Nevada revealed that 56% of Washoe County residents followed the media coverage regarding the NCAA-UNLV-Tarkanian matters. In Washoe County, 26% of its citizens want Jerry Tarkanian to prevail in this lawsuit as compared to 14% who want the NCAA to prevail. (Question 23, App. G. *infra.*) Although public sentiment in Washoe County slightly favors Tarkanian over the NCAA, the NCAA, without doubt, has a greater chance of receiving an impartial jury trial in a Nevada county other than Clark County.

Dr. Tedin's methodology and findings are detailed in an affidavit, see Appendix G, *infra*, that was presented to the state courts in this case.

Dr. Steven D. Penrod, who analyzed media coverage in Las Vegas and Reno respectively, is a leading expert in the content analysis of media coverage. He has conducted extensive research on the effect of pretrial publicity on the jury decision-making process and recently testified about such research in the Oklahoma City bombing case. Dr. Penrod, based upon his analysis of the media coverage and its content, concluded the following:

1. The Las Vegas media has targeted the NCAA with negative publicity by a 4 to 1 margin over that received by Tarkanian.

2. The Las Vegas media has favored Tarkanian with positive publicity by a margin of 2 to 1 over the NCAA.

3. The Las Vegas media has covered the dispute between Tarkanian and the NCAA with four times the intensity of the Washoe County media.

4. The Las Vegas media has published five times more statements about Tarkanian, the NCAA, and related events than has the Washoe County media.

Dr. Penrod's Affidavit, which outlines his analyses and findings, see Appendix H, *infra*, also was presented to the state courts in this case.

Over the course of the litigation between Tarkanian and the NCAA, the Las Vegas media has published inflammatory statements from members of the media, Las Vegas citizens, the Tarkanians' attorneys, the governor of the State of Nevada, state legislators, and local judicial officials that demonstrate and help explain the deeply-

embedded prejudice and bias against the NCAA in the Las Vegas community. Further, since 1990, two books disparaging NCAA's treatment of Tarkanian have been published and were in tremendous demand in Las Vegas, see Don Yaeger, *Shark Attack: Jerry Tarkanian and His Battle with the NCAA and UNLV* (1st Ed. Harper Collins, 1992); Don Yaeger, *Undue Process: The NCAA's Injustice for All* (1st Ed. Sagamore Publishing, 1990). A sample of the statements to which the citizens of Clark County have been exposed, include:

1. In a newspaper article, an attorney representing UNLV basketball players referred to the NCAA as the "embodiment of evil" and accused it of using "capricious Gestapo tactics."

2. In the book, *Undue Process*, an attorney for UNLV in the NCAA enforcement hearings made the accusation that Petitioner S. David Berst "fashioned his so-called evidence" in order to charge Tarkanian with violations of the NCAA rules.

3. In a Las Vegas newspaper article, the director of an activist group, "The Running Rebels Right to Return Committee," is quoted as saying "Our point . . . is that the NCAA has got to be stopped. I think they're worse than the Mafia or organized crime . . . I'd like to see them smashed into a thousand pieces."

4. A Tarkanian attorney publicly characterized the NCAA as "barbaric" with a "bounty on [Tarkanian's] head for 20 years."

5. Jerry Tarkanian publicly stated that the NCAA was conducting a "total ambush" on his career.

6. A Tarkanian attorney publicly stated that the NCAA conducted a "summary execution" of Jerry Tarkanian.

7. The Governor of Nevada publicly stated, as he was signing the subsequently struck-down Nevada legislation, that the NCAA has been "unfair" in its punishment of the UNLV basketball program.

8. A Las Vegas judge compared the NCAA to "Adolf Eichmann" and "the Ayatollah."

9. A Las Vegas judge publicly stated that it was the "NCAA's desired goal to sanction UNLV" and that he believed the NCAA "treated [Tarkanian] differently than any other individual." Lois Tarkanian publicly applauded the judge's statement, indicating that it would further the community's "understanding [of] what has been done to us."

The Appendix includes a small sampling of newspaper articles in which many of these statements, as well as other inflammatory or prejudicial remarks, were published. (App. E, *infra*). Throughout the course of Tarkanian's twenty-five year battle with the NCAA, hundreds of articles and commentaries prejudicial to the NCAA have been published in Las Vegas.

In addition to the media reports, there were at least two community organizations formed in the late '80s to support Tarkanian against the NCAA – "Committee to Save Tarkanian" and "Fight for Tarkanian". These organizations received copious media attention as they publicly lobbied the Nevada legislature for an investigation regarding Tarkanian's resignation. At public hearings, the NCAA and its enforcement staff, including defendant

Berst, were accused by state legislators and Tarkanian of manufacturing evidence against Tarkanian, falsely accusing him of arranging for phony grades, phony course credit and phony SAT and ACT scores for players, and generally carrying out a vendetta against Tarkanian.

In response to the NCAA's motion for change of venue in this case, the Tarkanians employed a single expert whose background and expertise is dissimilar to that of the NCAA's experts and who did not conduct a survey or media-content analysis. He submitted a report that only superficially criticized the findings of Drs. Tedin and Penrod.

The NCAA requested that the Clark County district court hold a hearing so that each party could have an opportunity to present evidence and cross-examine experts on the issue of community bias. The district court originally scheduled an evidentiary hearing under the assumption that it was the wish of both parties, but canceled it upon learning that the Tarkanians did not want an evidentiary hearing. Thus, without any evidentiary hearing, the district court issued an oral decision denying the NCAA's motion on the grounds that it was untimely, that pretrial publicity had ceased to be a factor, and that the NCAA's evidence did not account for "explosive growth" of the population in Clark County, all of which is contradicted by the record. (App. D, *infra*). The NCAA immediately appealed to the Supreme Court of Nevada because, under Nevada law, a party must appeal an order denying a change of venue motion within thirty days of the denial or else lose the right to appeal the issue at all. *See* Nev. Sup. Ct. R. App. Pro. 3A(b)(4).

In a 3-1 decision, the Supreme Court of Nevada affirmed, see App. A *infra*, rejecting the NCAA's contention that the court should conduct a *de novo* review of the record. Rather, the majority reviewed the trial court's order only for a manifest abuse of discretion reasoning that "[w]e independently review the record only to determine whether the lower court's decision was a manifest abuse of discretion." (*Id.* at App. 4). Using this standard of review the majority held that the district court did not manifestly abuse its discretion in denying the NCAA's motion for change of venue and request for an evidentiary hearing.[5]

One Justice dissented, maintaining that this kind of case necessitated a *de novo* review of the record, given its "constitutional dimensions." According to the dissent,

> What the record reveals is that for many years Mr. Tarkanian has been a folk-hero's folk hero in Las Vegas, a "legend," the town's "biggest star," the "most powerful" person in Las Vegas and a man "who will never be forgotten." I can think of no one in the history of Las Vegas who can match the glory of this man; but there is someone that can match Mr. Tarkanian, not in glory, but in infamy – none other than the "embodiment of evil," the "Adolph Eichmann," the "Ayatollah" and the "Gestapo" of sportsdom, namely, the "barbaric" National Collegiate Athletic Association.

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[5] As both the majority and the dissent recognized, the NCAA raised and preserved the federal issues regarding its constitutional right to a fair and impartial factfinder. (App. A, *infra*).

(*Id.* at App. 7). The dissent concluded that the "consciousness of this community overwhelmingly supports its hero and overwhelmingly damns the evil villain from Kansas City." *Id.* at App. 9. Thus, the dissent concluded that, based upon a *de novo* review of the record, "it is impossible for the NCAA to get a fair trial in Las Vegas." *Id.*

REASONS FOR GRANTING THE WRIT

I. This Court Has Never Expressly Declared, But Has Implicitly Recognized, That Defendants In Civil Cases Have A Fundamental Right To An Impartial Factfinder

This case involves the foundation upon which the scales of justice rest in a civil case. In a civil trial, the impartiality of the jury or the judge, as the arbiter of facts, verity and culpability, stands as a pillar in the fair and just administration of the law. Nonetheless, this Court has never directly addressed the level of protection to be afforded a civil litigant's fundamental right to an impartial factfinder under the Due Process Clause of the Fourteenth Amendment.[6]

The NCAA respectfully asks this Court to recognize expressly what is implicit in numerous decisions: that the right to an impartial factfinder in a civil action is a

[6] The NCAA is not inviting this Court to recognize that the Seventh Amendment right to a jury trial applies to the States. The right to a jury trial in this case is found in Nev. Const., Art. I, § 3. Rather, the NCAA contends that when the right to a jury trial has been conferred by federal or state law, due process entitles a defendant to an *impartial* jury (*i.e.*, the factfinder).

fundamental right entitled to heightened due process protection. This Court repeatedly has held or declared that due process entitles a person to an impartial, disinterested judicial officer and/or tribunal in both civil and criminal cases. *See e.g., Smith v. Phillips*, 455 U.S. 209, 217 (1982) ("Due process means a jury capable and willing to decide the case solely on the evidence before it"); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 241 (1980) ("The requirement of neutrality has been jealously guarded by this Court"); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986) (state supreme court justice's participation in this case in light of justice's participation as class-action plaintiff in related case violated due process); *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972) (due process violated when mayor acting in judicial capacity had pecuniary interest in assessing fines); *Tumey v. State of Ohio*, 273 U.S. 510 (1927) (due process violated when mayor acting in judicial capacity had pecuniary interest in convicting defendant). The NCAA is simply asking this Court to acknowledge expressly that these cases recognize that a civil litigant's right to an impartial, disinterested factfinder is a fundamental right.

This Court's fundamental rights jurisprudence has been a labor of outlining the "liberty" specially protected by the Fourteenth Amendment through concrete examples involving "fundamental rights found to be deeply rooted in our legal tradition." *Washington v. Glucksberg*, ___ U.S. ___, 117 S.Ct. 2258, 2268 (1997). In *Glucksberg*, this Court recently articulated the established framework for the analysis:

> First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," . . . and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed". Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest.

Id. (citations omitted). The right to an impartial factfinder in civil cases is a value deeply entrenched in our nation's history and tradition. It is one of the oldest mores of this nation carried over by the Mayflower voyagers who adopted as their first law of any description that all plaintiffs and defendants shall have the liberty to challenge any juror. No. 17. Massachusetts Body of Liberties, *Select Charters and Other Documents Illustrative of American History 1606-1775*, p. 72 (2nd Ed. MacMillan Co. New York, 1910).

The intense debate among our nation's founders as to whether the right to a jury in civil cases should be included in the new Constitution underscored the importance and understanding that such a jury would be impartial. The Anti-Federalists, who lobbied for the inclusion of such a right, often quoted Blackstone in support of their conviction:

> The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decisions, in spite of their own

> natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity; it is not to be expected from human nature, that the few should always be attentive to the interest and good of the many.

3 William Blackstone, *Commentaries* 379 (William S. Hein & Co., Inc. 1992) (1768).

The Federalists were likewise concerned about impartiality in the debates over whether the Constitution should require explicitly that the jury be drawn from the vicinage of the crime. In Massachusetts, for example, delegate Christopher Gore argued:

> The idea that the jury coming from the neighborhood, and knowing the character and circumstances of the party in trial, is promotive of justice, on reflection will appear not founded in truth. If the jury judge from any other circumstances but what are part of the cause in question, they are not impartial. The great object is to determine on the real merits of the cause, uninfluenced by any personal considerations; if, therefore, the jury could be perfectly ignorant of the person in trial, a just decision would be more probable.

Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (New York: Burt Franklin, 1888), 2:112-13.

The Court has expressly recognized an impartiality right in the context of requiring that a jury be representative of the community. *See, e.g., Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946) ("The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an

impartial jury drawn from a cross-section of the community"); *Smith v. Texas*, 311 U.S. 128, 130 (1940) ("It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community"); *Glasser v. United States*, 315 U.S. 60, 85 (1942) ("The proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class"); *see also, J.E.B. v. Alabama Ex Rel. T.B.*, 511 U.S. 127, 145 (1994) ("Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system"); *Edmonson v. Leesville Concrete Company, Inc.*, 500 U.S. 614, 630 (1991) ("Civil juries, no less than their criminal counterparts, must follow the law and act as impartial factfinders . . . [r]acial discrimination has no place in the courtroom"). In guarding against the dangers of prejudice with regards to jury selection, this Court has honored the ideal and value of impartiality in the administration of justice so prized by this Nation's founders.

The threat to impartiality does not lie only in the economic, social and demographic makeup of the jury. The predisposition of a community also can imperil impartiality as this Court long has recognized. *See e.g., Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (recognizing that "legal trials are not like elections, to be won through the use of the meeting-hall, the radio and the newspaper"). A jury drawn from a biased community is no more acceptable than a jury which is not drawn from a cross-section of the community. Although the cross-section guarantee has been implemented through the equal protection component of the Constitution's Fifth and Fourteenth Amendments with heightened scrutiny

afforded to certain classifications, *see e.g., J.E.B., supra* (equal protection clause of the Fourteenth Amendment prohibits discrimination in jury selection on basis of gender); *Edmonson, supra* (equal protection clause of the Fifth Amendment prohibits race-based exclusion of potential jurors in civil cases), the threat of community bias is equally likely to undermine our Nation's long-standing tradition of impartiality in both criminal and civil cases.

While it is apparent that the right to an impartial jury in a civil case is firmly rooted in this country's history and tradition, this Court has yet to acknowledge expressly that it is a fundamental right entitled to heightened due process protection. For this reason alone, this case merits a grant of certiorari.

II. There Is A Sharp Split Of Authority In The State And Lower Federal Courts Over The Appropriate Level Of Appellate Review For Claims Involving A Defendant's Fundamental Right To An Impartial Factfinder

In its 3-1 decision in this case, the Supreme Court of Nevada applied a manifest abuse of discretion standard in reviewing and upholding the trial court's denial of the NCAA's motion for a change of venue and request for an evidentiary hearing. The majority rejected the NCAA's contention that because of the fundamental nature of the right to an impartial factfinder, an appellate court must apply a *de novo* standard of review to such rulings.[7] The

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[7] A *de novo* standard of review is particularly warranted in this case where the trial court did not even hold an evidentiary hearing, and the appellate court essentially reviews the same written materials filed in the lower court.

dissent, on the other hand, concluded that, given the constitutional dimensions, a *de novo* review is required, and if conducted, would have shown that "this case 'represents exactly the type' of case where the place of trial must be changed." (App. A at App. 8)

This split among the members of the Supreme Court of Nevada is mirrored in the state and lower federal courts generally. See Annotation, *Pretrial Publicity in Criminal Cases as Grounds for Change of Venue*, 33 A.L.R.3d 17 (1970 & 1997 Supp.) (recognizing dichotomy among state and federal jurisdictions regarding the appropriate standard of appellate review of denial of motion for change of venue based upon right to an impartial trial). A number of state courts and at least one federal court of appeals conduct a *de novo* review of the record to determine whether a defendant in a civil case can obtain a fair and impartial trial. *See e.g., People v. Sanders*, 905 P.2d 420, 433 (Cal. 1995), *cert. denied*, 117 S.Ct. 115 (1996) (*de novo* review); *Powell v. Superior Court*, 283 Cal.Rptr. 777, 783 (Cal.App. 1991) (*de novo* review); *State v. Biegenwald*, 524 A.2d 130, 141 (N.J. 1987) (*de novo* review); *State v. Warwick*, 555 P.2d 1386, 1388 (Wash. 1976) (*de novo* review); *Houle v. North Dakota District Court*, 293 N.W.2d 872, 873 (N.D. 1980) (*de novo* review); *U.S. v. Faul*, 748 F.2d 1204, 1212 (8th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985) (*de novo* review). Other states and at least one federal court of appeals review the denial of a motion for change of venue in a civil case under an abuse of discretion standard. *See e.g., Ex Parte Kennedy*, 472 So.2d 1106 (Ala. 1985), *cert. denied*, 474 U.S. 975 (1985) (abuse of discretion); *State v. Moyd*, 619 P.2d 1107, 1109 (Hawaii App. 1980) (abuse of discretion); *State v. Montgomery*, 575 N.E.2d 167, 171 (Ohio 1991), *cert. denied*, 502 U.S. 1111

(1992); *Ransom v. State*, 789 S.W.2d 572 (Tex.App. 1989), *cert. denied*, 497 U.S. 1010 (1990) (abuse of discretion); *Breechen v. Reynolds*, 41 F.3d 1343 (10th Cir. 1994), *cert. denied*, 515 U.S. 1135 (1995) (abuse of discretion). Some states, including Nevada, and at least one federal court, apply an internally inconsistent standard in which "[a]ppellate review of an order granting or denying a change of venue is *de novo* and is subject to an abuse of discretion standard."[8] *State v. Farmer*, 492 N.W.2d 239, 241 (Iowa App. 1992); *see also*, *State v. Ware*, 338 N.W.2d 707 (Iowa 1983) (independent *de novo* review of record to determine abuse of discretion); *United States v. Corona*, 34 F.3d 876, 878 (9th Cir. 1994) (review district court ruling on motion for change of venue for abuse of discretion but conduct *de novo* review on underlying legal basis for such a claim).

This divergence in the state and lower federal courts derives from the existence of two distinct, and possibly inconsistent, lines of authority from this Court. The first line of cases involves this Court's review of the rights of criminal defendants to a fair and impartial jury in the face of pretrial publicity. *See e.g., Irvin v. Dowd*, 366 U.S. 717 (1961); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

In *Irvin v. Dowd*, 366 U.S. 717 (1961), this Court unanimously held that petitioner was denied due process of law under the Fourteenth Amendment because the jury in the state trial was not impartial. Citing widespread and

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[8] Even though the Supreme Court of Nevada majority in the recent *Tarkanian* decision articulated this standard of review, it did not perform an independent evaluation of the record upon which the NCAA's motion for change of venue was based.

inflammatory publicity, petitioner unsuccessfully sought a change of venue and he subsequently was convicted of murder and sentenced to death. On review this Court stated that the constitutional question is "whether the nature and strength of the opinion formed are such as in law necessarily . . . raise the presumption of partiality. The question thus presented is one of mixed law and fact." 366 U.S. at 723 (quoting *Reynolds v. United States*, 98 U.S. 145, 156 (1879)). The Court also indicated that appellate courts are required to independently evaluate the record in such cases. *Id.* Upon an independent review, this Court found a "pattern of deep and bitter prejudice", *id.* at 727, throughout the community that deprived the defendant of an impartial trial.[9]

In perhaps the most famous decision in this line of cases, *Sheppard v. Maxwell*, 384 U.S. 333 (1966), this Court explicitly declared that appellate courts must apply a *de novo* level of review when determining whether prejudicial publicity will prevent a fair trial. Dr. Sheppard was accused of bludgeoning his pregnant wife to death. The media coverage and publicity was pervasive and inflammatory both before and during trial. This Court articulated the duties of both the trial and appellate courts as follows:

> Given the pervasiveness of modern communications and the difficulty of effacing prejudicial

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[9] In *Irvin v. Dowd*, this Court touched upon the effect of deeply-rooted prejudice, which a defendant in the NCAA's position faces, when it stated that "[t]he influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental process of the average man." 366 U.S. at 727.

> publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances.

384 U.S. at 362. Based on *Maxwell* and this line of cases, many appellate courts apply a *de novo* level of review in cases like *Tarkanian v. NCAA*. See cases cited on page 20, *supra*.

There is a second line of cases from this Court, however, which has created confusion in the lower courts and resulted in several courts adopting an abuse of discretion standard of review, as the Supreme Court of Nevada did, in the context of this case. In *Patton v. Yount*, 467 U.S. 1025 (1984), a federal habeas case, this Court held that a trial court's findings that a jury is impartial should be overturned only for "manifest error." The Court cited its prior decision in *Irvin v. Dowd* and the 28 U.S.C. § 2254(d) presumption of correctness in support of this standard of review. 467 U.S. at 1031-1032.

In a footnote in the majority opinion, the Court discussed the language in *Irvin*, which required appellate courts to "independently evaluate" the voir dire testimony and the nature of the question of juror partiality as a mixed question of law and fact, in terms of how it affected the presumption of correctness under the habeas corpus statute. 467 U.S. at 1031 n. 7. The Court explained that the habeas standard was not any less stringent than the manifest error standard. *Id.* In *Patton*, the Court left open whether the nature of the enquiry into a particular (*i.e.*, actually seated) jury's impartiality as a mixed question of law and fact affects the deference an appellate

court accords to a trial court's determination. Further, the Court did not mention the *de novo* standard of review it articulated in *Sheppard v. Maxwell,* nor did it address how or whether the "manifest error" standard can be reconciled with the *Maxwell* pronouncement.

In another footnote in *Patton,* the Court discussed its 1879 opinion in *Reynolds v. United States,* 98 U.S. 145, which held that the question whether a juror should be disqualified involves both a legal standard and findings of fact with the latter to be set aside only for manifest error. 467 U.S. at 1038 n. 12. The Court quoted the following passage from *Reynolds*:

> The manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case.

Id. This discussion suggests that the deference to be accorded is to the trial judge's opportunity to observe the demeanor of witnesses and judge the credibility of live testimony. A reasonable inference is that the trial judge's findings are not necessarily entitled to deference where they are not based upon personal observation of the juror and his opinion. The Court in *Patton* did not address the issue of whether the level of deference should change when the judge's findings, as in this case, are based on the attitudes of the community as a whole.

In *Mu'Min v. Virginia,* 500 U.S. 415 (1991), a capital murder case, this Court reiterated the *Patton* standard that a trial court's findings of juror impartiality may "be

overturned only for 'manifest error'." *Id.* at 428. The Court rejected petitioner's claim that his Sixth Amendment and due process rights were violated when the trial judge refused to question prospective jurors about the specific content of news reports to which they had been exposed. As Justice O'Connor noted in her concurrence, the credibility determinations of the trial judge who observed the jurors' assurances are entitled to "special deference" and will be reversed only for "manifest error." *Id.* at 433, (quoting *Patton v. Yount*, 467 U.S. at 1031-1032, 1038). Again, the Court did not address when an appellate court has a duty, as articulated in *Maxwell*, to make an independent evaluation of potential bias or partiality.

Although Petitioners respectfully suggest that the deferential review endorsed in cases like *Patton* or *Mu'Min* can be explained by the fact that those cases involved challenges to the impartiality of actual jurors (*i.e.*, credibility determinations) and were on federal habeas review as in *Patton* (invoking the § 2254(d) presumption of correctness), there is no doubt that the different standards of review the Court has adopted in superficially similar circumstances has resulted in confusion in the lower federal and state courts.

Of the two approaches, *de novo* review, which the Supreme Court of Nevada majority rejected in this case, appears more consistent with this Court's acknowledgment that when necessary, an appellate court has the ultimate power to conduct an independent review of constitutional claims. *See e.g., Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 509-10 (1984) (reiterating prior precedent that "in cases in which there is a claim of denial of rights under the Federal Constitution, the Court is not bound by the conclusions of lower courts but will

re-examine the evidentiary basis on which those conclusions are founded"); *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964) ("This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied"); *Fiske v. Kansas*, 274 U.S. 380, 385-386 (1927) ("This Court will review the finding of facts by a state court where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts"). Because a civil litigant's right to an impartial factfinder is a fundamental right, this Court should grant certiorari in this case in order to clarify and explain when an appellate court has a constitutional duty to make an independent *de novo* evaluation of a constitutional claim involving the fundamental right to a fair and impartial trial.

III. Based Upon An Independent Evaluation, The NCAA's Right To An Impartial Factfinder Will Be Violated If The Trial Is Held In Clark County, Nevada

While the express recognition of the fundamental right to an impartial factfinder in a civil case and the clarification of the appropriate standard of appellate review of a change of venue motion based upon this fundamental right will provide beneficial guidance to the Nation's lower federal and state courts, it is the combination of facts, issues and circumstances presented in this case that warrants the Court's highly-reserved *de novo*

review of the record to determine whether the NCAA's right to an impartial factfinder is being violated. Because of the constitutional significance of the NCAA's claim, the NCAA respectfully requests that this Court make an independent evaluation of the facts underlying its request for a change of venue. *See, Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 508 (1984) (observing that "it was only natural" that the Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964), "should conduct an independent review of the evidence on the dispositive constitutional issue"). Since this case presents novel questions, the Court's *de novo* review and analyses in this case would be instructive on these issues.

Not only does the record show a pervasive bias in Clark County in favor of the Tarkanians and against the NCAA, but it reveals an extraordinary public expression of partiality and bias by state and local government officials. The governor of Nevada has publicly expressed bias in favor of Tarkanian and against the NCAA. (App. E at App. 39). The state legislature enacted unconstitutional legislation targeting the NCAA and conducted public hearings in which it accused the NCAA of "manufacturing" evidence against Tarkanian. (App. E at App. 39). And most importantly, members of the state judiciary have made unprecedented and inflammatory public comments regarding the NCAA. (App. E at App. 23). Thus, in this factually unusual case, the issue is more than the community bias of private citizens who make up the jury pool. Rather, the acrimony towards the NCAA has infected every branch of state government.

In turn, public prejudicial statements by state officials as well as by the media, Tarkanian, Tarkanian's attorneys, and influential community activists have

fueled the deeply-embedded community bitterness and resentment towards the NCAA. The record reveals that the Clark County community, which has celebrated many UNLV victories including an NCAA championship with Tarkanian as head coach, firmly supports Tarkanian with a 6 to 1 margin of citizens in favor of Tarkanian prevailing in this lawsuit. (App. G at 96, question 23). The record exposes the fact that a majority of Clark County citizens already have condemned the NCAA, without even hearing the evidence.

The dissent below best summarized the situation:

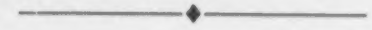
> The picture is quite plain: Local folk-hero is wrongly and unfairly destroyed by a foreign devil which had 'indulged in a 20-year conspiracy to drive [Tarkanian] from coaching' and to 'ruin [Tarkanian's] name and reputation with the intent of running him out of coaching.' Now representatives of the Las Vegas community are being called upon, in jury empaneled, to pass judgment on whether their 'ruined' folk-hero should be compensated for the harm claimed to have been caused to their hero by a wrongful conspiracy wrought by the hands of those 'evil' NCAA people 'in Kansas City.'
>
> * * *
>
> All of the characterizations which I mention above (NCAA as being the villain, embodiment of evil, barbaric and the like; and the legendary Las Vegas celebrity . . .) are matters not of occasional public comment but, rather, matters that have been the subject of the most extensive, saturating media coverage that has been afforded to any Las Vegas celebrity.

* * *

> Of course, it can be argued that the torrent of publicity has subsided and that no one in Las Vegas much remembers 'Tark' any more. I think that the record belies such an argument; but even if it were correct, and even if the publicity has died down, the very nature of this lawsuit involves 'peculiar' or 'sensational' subject matter which 'bring[s] it to the consciousness of the community,' where it remains, virtually indelible to this day. [citation omitted]. There can be little doubt from the record now before us that the consciousness of this community overwhelmingly supports its hero and overwhelmingly damns the evil villain from Kansas City. Mr. Tarkanian's case against the NCAA should not have to be tried under these circumstances.

(App. A at 7-9).

As the dissent recognized, this case involves two high-profile civil litigants – plaintiffs beloved by the community and defendants who are loathed. It is in precisely these circumstances that a change of venue is necessary to preserve a civil defendant's right to a fair and impartial factfinder. This Court should grant certiorari to determine whether, in light of the constitutional considerations set forth above, the NCAA's right to an impartial factfinder will be violated if the trial is held in Clark County, Nevada.



CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant this petition for a writ of certiorari and set this case for plenary review.

Respectfully submitted,

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October, 1997

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEVADA

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, S. DAVID BERST, AND ROBERT L. STROUP, II, Appellants, vs. JERRY TARKANIAN and LOIS TARKANIAN, Respondents.	No. 28508 (Filed May 22, 1997)

Appeal from an order of the district court denying appellants' motion for a change of venue. Eighth Judicial District Court, Clark County; Jack Lehman, Judge.

Affirmed.

Thorndal, Backus, Armstrong & Balkenbush and Craig R. Delk and Stewart C. Fitts, Las Vegas; Swanson, Midgley, Gangwere, Kitchin & McLarney, Kansas City, Kansas,
for Appellants.

Charles E. Thompson, Las Vegas; Beckley, Singleton, Jemison & List and Daniel F. Polsenberg, Las Vegas; Freberg & Manley, Irvine, California; Law Offices of Terry M. Giles, Rancho Santa Fe, California,
for Respondents.

OPINION

By the Court, SHEARING, C.J.:

Between 1973 and 1992, respondent Jerry Tarkanian ("Tarkanian") coached basketball at the University of Nevada, Las Vegas ("UNLV"). During this time, appellants National Collegiate Athletic Association, S. David Berst, and Robert L. Stroup, II (collectively the "NCAA"), investigated and found violations of NCAA legislation by the UNLV basketball program and Tarkanian, and implemented sanctions. In 1992 Tarkanian resigned from his coaching position at UNLV.

On November 30, 1992, Tarkanian and his wife filed a complaint alleging that the NCAA wrongfully attempted to force Tarkanian out of college coaching. On January 19, 1993, the Tarkanians filed an amended complaint. On March 22, 1996, the NCAA filed a motion for change of venue and request for evidentiary hearing. In its motion, the NCAA argued that a change of venue was proper because due to pretrial publicity, there was a reasonable likelihood that an impartial trial could not be held in Clark County. The motion was supported by the affidavit of Kent L. Tedin ("Tedin"), an expert in public opinion and statistics who conducted a public opinion poll in Las Vegas and Reno between February 23 and March 2, 1996; the affidavit of Steven Penrod ("Penrod"), an expert in pretrial publicity who conducted a content analysis of Las Vegas and Reno newspaper coverage; and newspaper articles and videotapes of newscasts that the NCAA alleged showed bias against them and in favor of Tarkanian.

The Tarkanians' opposition to the NCAA's motion was supported by an affidavit by Robert Tortora ("Tortora"), a statistician who criticized the methodology used by Tedin and Penrod as leading to inaccurate assessments of the opinions or beliefs held by potential jury pools from Clark and Washoe Counties.

Initially the trial was set for May 28, 1996. On April 30, 1996, the district court filed an order denying the NCAA's motion for change of venue and request for evidentiary hearing. At the hearing on the motion, the court made the following oral findings:

> This motion is untimely because defendants base their request upon facts which were known or should have been known over five years ago when this case was first filed.
>
> In addition, during the passage of these five years the amount of media attention that this case has received has not only greatly diminished but it has literally disappeared. Professor Penrod's study relies predominantly upon media reports which are four years old or more. In addition the defendants have not taken into account the explosive growth of Clark County's population, which has brought huge numbers of people into the County during the past five years who are completely unfamiliar with this case. . . .
>
> Finally, this Court is not persuaded that an evidentiary hearing on defendant's test results would serve a useful purpose and therefore this request is denied.

The NCAA filed a timely appeal from the district court's order. The trial was stayed pending this appeal.

A motion for change of venue must be granted where there is a reasonable likelihood that in the absence of such relief, an impartial trial cannot be held. Martinez v. Superior Court, 629 P.2d 502, 503 (Cal. 1981) (citing Maine v. Superior Court, 66 Cal. Rptr. 724 (Cal. 1968)). Courts look to five factors to determine if venue should be transferred: (1) the nature and extent of pretrial publicity; (2) the size of the community; (3) the nature and gravity of the lawsuit; (4) the status of the plaintiff and defendant in the community; and (5) the existence of political overtones in the case. People v. Hamilton, 774 P.2d 730, 737 (Cal. 1989). The NCAA contends that the district court failed to consider these factors, and that an independent review shows that these factors favor a change of venue.

This court reviews a trial court's order denying a motion to change venue for a manifest abuse of discretion. Fabbi v. First Nat'l Bank, 62 Nev. 405, 414, 153 P.2d 122, 125 (1944), *cited in* Pearce v. Boberg, 87 Nev. 255, 256, 485 P.2d 101, 101 (1971). We independently review the record only to determine whether the lower court's decision was a manifest abuse of discretion. *See* State v. Ware, 338 N.W.2d 707 (Iowa 1983) (reviewing the record *de novo* to make an independent evaluation of the circumstances to determine whether there was an abuse of discretion); State v. Moyd, 619 P.2d 1107 (Haw. Ct. App. 1980) (rejecting *de novo* review).

The NCAA argues that pretrial publicity has been inflammatory and extensive and created widespread community bias against the NCAA.

Penrod analyzed 1,228 articles that mentioned UNLV basketball, Tarkanian, or the NCAA. These articles were published no later than 1992, four years prior to the trial date, by two newspapers, the *Reno Gazette Journal* and the *Las Vegas Review Journal*. Penrod's analysis shows that the *Las Vegas Review Journal* was four times more likely than the *Reno Gazette Journal* to print negative statements about the NCAA. Penrod found an additional five hundred *Las Vegas Review Journal* articles published between January 1993 and April 1996 that referred to Tarkanian, but he did not analyze those articles for content. Tedin's poll shows that Clark County bias in favor of Tarkanian and against the NCAA continued as late as March 1996.

Tortora criticized Penrod's analysis, noting that the link between the content of the articles and general attitudes about the target populations was unclear. Tortora also discussed design flaws in Tedin's survey, including the failure to implement procedures to eliminate nonresponse bias. Tortora stated, "there is no evidence to link the trends in the newspaper articles with the attitudes, opinion, and beliefs of those in [Tedin's] surveys." The record also shows that the population of Las Vegas grew from 858,232 in 1992, the year that the Tarkanians filed their complaint, to 1,028,228 in 1995. Thus, a large proportion of the potential jury pool was not exposed to the articles Penrod analyzed.

With a scant few exceptions, the newspaper quotations the NCAA characterizes as "inflammatory" were published several years before the May 1996 trial date. The most inflammatory of these quotations appeared in a single article published in 1992, and are

attributed to Tarkanian's attorney and to the UNLV basketball players' attorney. Whether or not these statements were inappropriate is not the issue in this appeal. The NCAA has failed to show that the Clark County jury pool was likely to have read these statements or shared in their sentiments.

We conclude that substantial evidence in the record supports the district court's ruling and that the district court did not manifestly abuse its discretion in denying the NCAA's motion for a change of venue and request for evidentiary hearing.

Because the trial court did not err in denying the NCAA's motion, it is unnecessary to address the NCAA's contention that a jury questionnaire cannot eliminate bias.

/s/ Shearing, C.J.
Shearing

We concur:[1]

/s/ Young, J.
Young

/s/ Rose, J.
Rose

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[1] The Honorable A. William Maupin, Justice, did not participate in the decision of this appeal.

SPRINGER, J., dissenting:

In my opinion, the NCAA probably cannot get a fair trial in Las Vegas; therefore, I dissent.

In these kinds of cases, "[a]ppellate tribunals have the duty to make an independent evaluation of the circumstances." Sheppard v. Maxwell, 384 U.S. 333, 362 (1966). Although we have traditionally reviewed change of venue orders on the basis of whether there was "manifest abuse of discretion" in the trial court's ruling, it is my view that, given the constitutional dimensions of this case, we should conduct a *de novo* review of the record below. There is no reason in the present case why this court should not engage in an independent review of this matter and decide, independent of the trial court's ruling, the legal and constitutional question of whether there is a reasonable likelihood to believe that the NCAA cannot get a fair trial in Las Vegas.

What the record reveals is that for many years Mr. Tarkanian has been a folk-hero's folk-hero in Las Vegas, a "legend," the town's "biggest star," the "most powerful" person in Las Vegas and a man "who will never be forgotten." I can think of no one in the history of Las Vegas who can match the glory of this man; but there is someone that can match Mr. Tarkanian, not in glory, but in infamy – none other than the "embodiment of evil," the "Adolph Eichmann," the "Ayatollah" and the "Gestapo" of sportsdom, namely, the "barbaric" National College Athletic Association.

The picture is quite plain: Local folk-hero is wrongly and unfairly destroyed by a foreign devil which had "indulged in a 20-year conspiracy to drive [Tarkanian]

from coaching" and to "ruin [Tarkanian's] name and reputation with the intent of running him out of coaching." Now representatives of the Las Vegas community are being called upon, in jury empaneled, to pass judgment on whether their "ruined" folk-hero should be compensated for the harm claimed to have been caused to their hero by a wrongful conspiracy wrought by the hands of those "evil" NCAA people "in Kansas City." To my way of thinking, this case "represents exactly the type" of case where the place of trial must be changed. *See* Martinez v. Superior Court of Placer County, 629 P.2d 602, 503-08 (Cal. 1981).

All of the characterizations which I mention above (NCAA as being the villain, embodiment of evil, barbaric and the like; and the legendary Las Vegas celebrity, Mr. Tarkanian, as being the victim of a wrongful conspiracy perpetrated by the NCAA people from Kansas City) are matters not of occasional public comment but, rather, matters that have been the subject of the most extensive, saturating media coverage that has been afforded to any Las Vegas celebrity. The NCAA maintains, and I agree, that local prejudice – both ways – is so "widespread and deeply embedded into the community's consciousness that its biased effects cannot be alleviated." Even absent the social scientists' opinion supporting this conclusion, it is clear to me that the NCAA's position in this matter is correct.

Of course, it can be argued that the torrent of publicity has subsided and that no one in Las Vegas much remembers "Tark" any more. I think that the record belies such an argument; but even if it were correct, and even if the publicity has died down, the very nature of this

lawsuit involves "peculiar" or "sensational" subject matter which "bring[s] it to the consciousness of the community," where it remains, virtually indelible to this day. *Martinez*, 629 P.2d at 502, 506. There can be little doubt from the record now before us that the consciousness of this community overwhelmingly supports its hero and overwhelmingly damns the evil villain from Kansas City. Mr. Tarkanian's case against the NCAA should not have to be tried under these circumstances.

The record shows that most people in Las Vegas want Mr. Tarkanian to win this lawsuit, and almost three out of four believe that the NCAA has done great damage to their university, UNLV. Even if this kind of data does not demonstrate that the NCAA cannot get a fair and impartial trial, permitting the trial to proceed in Las Vegas at least demonstrates an *appearance* of injustice. We must ask ourselves whether "justice satisfies the appearance of justice" and whether there is an "appearance of impartiality." In re Murchison, 349 U.S. 133 (1955). It most certainly *appears* to me that it is impossible for the NCAA to get a fair trail in Las Vegas; therefore, I dissent.

/s/ Springer, J.
Springer

ATTEST: A FULL, TRUE AND
CORRECT COPY.

CLERK OF THE SUPREME COURT
By: /s/ A. TROOP
Deputy Clerk

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEVADA

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, S. DAVID BERST, AND ROBERT L. STROUP, II,	)	No. 28508
Appellants,	)	(Filed Jul. 16, 1997)
vs.	)	
JERRY TARKANIAN AND LOIS TARKANIAN,	)	
Respondents.	)	

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.[1]

/s/ Shearing, C.J.
Shearing

/s/ Springer, J.
Springer

/s/ Rose, J.
Rose

/s/ Young, J.
Young

---

[1] The Honorable A. William Maupin, Justice, did not participate in the decision of this appeal.

cc: Hon. Jack Lehman, District Judge
Thorndal, Backus, Armstrong & Balkenbush
Swanson, Midgley, Gangwere, Kitchin & McLarney
Charles E. Thompson
Freberg & Manley
Law Offices of Terry M. Giles
Beckley, Singleton, Jemison & List
Loretta Bowman, Clerk

APPENDIX C

NEOJ
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DISTRICT COURT

CLARK COUNTY, NEVADA

JERRY TARKANIAN AND LOIS TARKANIAN, Plaintiffs, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, WALTER BYERS, S. DAVID BERST, ROBERT L. STROUP III and DOES 1 through 100, inclusive, Defendants.	CASE NO. A314006 DEPT. NO. 10 DOCKET NO. K

NOTICE OF ENTRY OF ORDER

Hearing Date:
Hearing Time:

PLEASE TAKE NOTICE that an Order was entered in the above matter on the 1st day of May, 1996, a true and correct copy of which is attached hereto.

THORNDAL, BACKUS,
ARMSTRONG & BALKENBUSH

By /s/ Craig R. Delk
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**ATTORNEYS FOR
DEFENDANTS NCAA,
S. DAVID BERST AND
ROBERT L. STROUP III**

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Thorndal, Backus, Armstrong & Balkenbush, and that on the 1st day of May, 1996, I duly deposited for mailing, postage prepaid, at Las Vegas, Nevada, a true and correct copy of the above and foregoing Motion, addressed as follows:

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/s/ R. Borden
An employee of THORNDAL,
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DISTRICT COURT

CLARK COUNTY, NEVADA

JERRY TARKANIAN AND LOIS TARKANIAN, Plaintiffs, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, WALTER BYERS, S. DAVID BERST, ROBERT L. STROUP III and DOES 1 through 100, inclusive, Defendants.	CASE NO. A314006 DEPT. NO. 10 DOCKET NO. K

ORDER DENYING DEFENDANTS' MOTION FOR CHANGE OF VENUE and REQUEST FOR EVIDENTIARY HEARING

(Filed May 1, 1996)

Hearing Date: April 30, 1996
Hearing Time: 9:00 AM

Defendants' Motion for Change of Venue and Request for Evidentiary Hearing having come on for hearing before this Court on April 30, 1996, the Court having reviewed the papers filed in support of and in opposition to said Motion and Request, and the Court believing there to be good cause to deny the same,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that Defendants' Motion for Change of Venue and Request for Evidentiary Hearing be, and the same hereby is, denied.

DATED this 30 day of April, 1996.

/s/ JACK LEHMAN
DISTRICT JUDGE

Submitted by:

THORNDAL, BACKUS,
ARMSTRONG & BALKENBUSH

By /s/ Craig R. Delk
CRAIG R. DELK
Attorneys for Defendants
NEVADA BAR NO. 2295
1100 East Bridger Avenue
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APPENDIX D

DISTRICT COURT

CLARK COUNTY, NEVADA

JERRY TARKANIAN, Plaintiff, vs. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, WALTER BYERS, S. DAVID BERST, ROBERT L. STROUP, et al., Defendants.	)	CASE NO. A314006 DEPT NO. X DOCKET K (Filed May 02 1996)

BEFORE THE HONORABLE
JACK LEHMAN, DISTRICT JUDGE

TUESDAY, APRIL 30, 1996

DEFENDANTS' MOTION FOR
CHANGE OF VENUE

CALENDAR CALL

APPEARANCES:

PLAINTIFFS REPRESENTED BY:	KATHERINE K. FREBERG, ESQ. TERRY M. GILES, ESQ.
DEFENDANT NCAA:	CRAIG R. DELK, ESQ. STEWART C. FITTS, ESQ. JAMES H. McLARNEY, ESQ.

RECORDER/TRANSCRIBER
Sharleen Nicholson

[p. 2] LAS VEGAS, NEVADA: TUESDAY, APRIL 30, 1996 AT 9:00 A.M.

THE COURT: Tarkanian v. NCAA.

MS. FREBERG: Good morning.

THE COURT: Good morning.

MS. FREBERG: Kathy Freberg and Terry Giles on behalf of the plaintiffs.

THE COURT: Okay.

MR. DELK: Craig Delk, Your Honor, on behalf of NC two A.

MR. McLARNEY: James McLarney from Kansas City for defendants.

MR. FITZ: Stewart Fitts, Your Honor, for the NC double A.

THE COURT: Okay.

MR. DELK: Your Honor, a little preliminary matter as we discussed earlier this morning is the application for admission, in this case only, for Mr. Neil Johnson of the Kansas City law firm. The matter was not on calendar but my understanding is that it is unopposed.

MS. FREBERG: It is, Your Honor.

THE COURT: Okay. It's granted.

MR. DELK: Alright. Thank you, Your Honor. I'll prepare that order.

THE COURT: Here is what I find. Defendants' motion for a change of venue is denied. This motion is

untimely because [p. 3] defendants base their request upon facts which were known or should have been known over five years ago when this case was first filed.

In addition, during the passage of these five years the amount of media attention that this case has received has not only greatly diminished but it has literally disappeared. Professor Penrod's study relies predominantly upon media reports which are four years old or more. In addition the defendants have not taken into account the explosive growth of Clark County's population, which has brought huge numbers of people into the County during the past five years who are completely unfamiliar with this case. Finally, this Court is – with the case or with the parties that are involved.

Finally, this Court is not persuaded that an evidentiary hearing on defendant's test results would serve a useful purpose and therefore this request is denied. You may put on the record anything you wish.

MR. DELK: Your Honor, does your order also include a denial of our – a renewal of our request for an evidentiary hearing on this matter?

THE COURT: Yes.

MR. DELK: In light of Your Honor's ruling, pursuant to NRAP, we would request a stay pending appeal, sir.

THE COURT: Okay, but you better get it in fast.

[p. 4] MR. DELK: I'll do that.

THE COURT: It doesn't extend the trial date and so forth.

MR. DELK: I don't understand.

THE COURT: Now that's why I had indicated that I thought that this was an appropriate case for a questionnaire because it seems to me we can greatly narrow down the number of people that are sent up for the jury panel by determining whether in fact there are any strong, rabid fans that are possible jurors on one side or the other.

MR. DELK: Of course our position on that point, Your Honor, is that that is an unreliable means of filtering out the unreliable jurors as further elaborated in our motion, but –

THE COURT: A lot of very good attorneys feel that it's a very reliable source. I've done it on several occasions over the years. I've always found it very reliable.

MR. DELK: Am I correct then, Your Honor, that the stay is granted pending appeal?

THE COURT: The stay is granted to the extent that if it does not interfere with the trial date. I'm not going to vacate the trial date.

MR. DELK: Even in the event the Supreme Court has not had an opportunity yet to rule on the appeal?

[p. 5] THE COURT: You can let the Supreme Court know in your pleadings that this is an extraordinary writ and that there's a trial date set at a certain time and that I am not predisposed to once again vacate this trial date.

MR. DELK: Okay. We are not here to delay matters, Your Honor.

THE COURT: I understand.

MR. DELK: Notwithstanding comments to the contrary.

THE COURT: As a matter of fact your side was vigorously opposed to continuing the trial before the basketball season.

MR. DELK: That's exactly correct, as were we when the matter was remanded to state court in the first place up in Reno, Your Honor. The third request for a continuance coming from the plaintiffs was stipulated to us – by us but –

THE COURT: Yes.

MR. DELK: – We were not interested in delaying the proceedings. I guess my concern is that notwithstanding notice to the Supreme Court that we request an expedited hearing on the matter, if they for whatever reason are not able to expedite a ruling and May 28th rolls around, my understanding is that the stay, by definition, will stay the proceedings.

THE COURT: I'm not granting the stay. Let me just say that. If in fact they haven't ruled by some time reasonably [p. 6] a few days before the 28th, then you can come in front of me and we'll see what's going on.

MR. DELK: Alright. So, in the interim –

THE COURT: This is a six-week trial which is extremely hard to find a placement for. I don't know

when the five year statute on this runs. Can you tell me anybody? When was this filed?

MR. DELK: This was filed in 1992, Your Honor.

MS. FREBERG: It was filed December of 1991.

THE COURT: Because to get six weeks would take easily to November or December or possibly after the first of the year. It was tough to find six weeks here.

MR. DELK: Well I'd hate to get that close to trial, Your Honor, and have the Supreme Court reverse and have to do this all over again some place else.

THE COURT: Well I'm going to have a happy thought that they won't reverse me.

MR. DELK: Alright. In the meantime do I understand then that the request for a stay has been denied?

THE COURT: That's correct. I'm going to deny it.

MR. DELK: Thank you.

[p. 7] MR. McLARNEY: Thank you, Your Honor.

THE COURT: Okay.

MS. FREBERG: Thank you.

* * *

ATTEST: Full, true and accurate transcript.

/s/ Sharleen Nicholson
SHARLEEN NICHOLSON
Special Recorder

APPENDIX E

Excerpts from

SHARK ATTACK

Jerry Tarkanian and His Battle with the NCAA and UNLV

By Don Yaeger

With the Cooperation of Jerry Tarkanian

* * *

pp. 106-108

The attention given Tarkanian's case worsened his national reputation, to be sure. But it also took its toll on the NCAA, whose backside suddenly was exposed to an increasing number of newspaper columnists. In 1978, the *Chicago Sun-Times* declared Tarkanian the "most important" college coach of the year. "Granted there may have been better ones, particularly at De Paul, Marquette, and UCLA," the newspaper wrote. "But none of these fine gentlemen ever may have the lasting impact Tarkanian has had on the way that morality is legislated in their sport." The *Los Angeles Times's* Jim Murray wrote this after the congressional hearings were complete: "The National Collegiate Athletic Association as a governing body in collegiate athletics occupies the same spot in the hearts of its subjects as the Gestapo in Warsaw. The NCAA deals in more hearsay than Rona Barrett."

As the headlines and the evidence mounted, so did the legal opinions.

Clark County (Nevada) District Court judge James Brennan, who was the first to hear the case and who ruled against the NCAA, said this in his trial court opinion:

The case against Tarkanian was incredible. The evidence the NCAA presented was 100 percent hearsay without a scrap of documentation in substantiation. The evidence shows that every fundamental principle pertaining to the plaintiff's due process rights were violated. The Committee on Infractions and its staff conducted a star chamber proceeding and a trial by ambush against the plaintiff. The plaintiff was denied the specific charges against him and the facts upon which such charges are based. The plaintiff was denied the right to present evidence and call witnesses in his behalf. And most important, he was denied the right to be confronted by witnesses against him and cross-examine them. The Committee on Infractions allowed a staff investigator, who, the evidence clearly shows, swore he would get Tarkanian if it was the last thing he ever did, to act as investigator, judge and jury. The record is replete with lies, distortions and half-truths. The evidence clearly shows Berst as a man possessed and consumed with animosity toward the plaintiff. There is no legal credible evidence to support the findings and action of the NCAA.

While hearing the case, Brennan took special exception to Berst's handling of his duties: "A review of the sworn statements in evidence shows that David Berst had an obsession to the point of paranoia to harm the plaintiff. The record is replete with lies, distortions and half-

truths of David Berst in this case to the extent that anything he may have presented to the Committee on Infractions was totally devoid of credibility."

Not to be outdone, Judge Goldman, who next heard the case, put it this way:

This case presents a classic example of how misperception becomes suspicion, which in turn becomes hostility, which leads, inevitably, to a deprivation of one's rights. In short, the NCAA now seems to say: If you want to play ball, you must join us, obey rules and surrender any claim you may have under the Bill of Rights. This court disagrees with that attitude, as any fair-minded person must. At least one of the NCAA's investigators [David Berst] inspired, authored and drafted – in whole or in part – the NCAA preliminary investigation; the authority to issue an inquiry to UNLV; the Official [letter of] Inquiry; the minutes of the Committee on Infractions wherein the committee's rules appeared; the Confidential Report of the Committee; the Findings and Penalties imposed by that Committee; the Expanded Confidential Report (with the enforcement division's comments) used by the Council on appeal; and the order of the Council and the widely promulgated press releases about the supposed violations of NCAA "legislation." In sum, what started out as an association whose members met and acceded to certain lofty goals ended up as the NCAA-bureaucracy which looks upon its friends (sycophants) with feigned pleasure, and its enemies (those who still recognize the U.S. Constitution) with barely concealed malevolence. Regrettably, both the full-time investigators and part-time Committee on Infractions and NCAA Council members acted and thought, not like Caesar's wife, but rather as arrogant lords of the manor. The NCAA, incredibly, sought to equate "time" with "due process." The reasoning of the NCAA was, apparently, that since the infractions committee's and the NCAA

Council's presentations were time-consuming, Tarkanian and UNLV were afforded due process. NCAA practices might be considered "efficient," but so was Adolf Eichmann and so [was] the Ayatollah.

During the trial, Goldman wrote that in his opinion NCAA lawyers even attempted to argue that this case was out of the jurisdiction of any court. They made that claim after quoting the *NCAA Manual*, which states that the Infractions Committee's decision "shall be final, binding and conclusive, and shall not be subject to further review by the Council or any other authority." As arrogant as the NCAA was, it still seemed hard to believe the organization would tell a judge that its decision was above the law. Goldman said that assertion was "laughable." He said the clause in the *NCAA Manual* "illustrates the arrogance" of the organization. "Even the NCAA's insistence on the use of the word 'legislation' instead of 'rules' gives us a view of the NCAA's view of itself and its power," he wrote.

* * *

UNDUE PROCESS: THE NCAA'S INJUSTICE FOR ALL

by Don Yaeger

pp. 219, 224-225

Convinced if he left for the pros he would be found guilty in the court of public opinion, Tarkanian told Cooke he didn't want the Lakers job and placed his faith in a "fair" NCAA. That was a decision he today regrets.

"When I and others from UNLV went in front of the infractions committee, they didn't really consider our evidence or listen to us," he said years later, "It was a total ambush. They just were a rubber stamp for what the investigators wanted. It was an awful time, because I knew something bad was coming from the NCAA, but I didn't know what the charges would be. All I could be sure of was that the NCAA was going to say we did something.

* * *

newspaper accounts of UNLV's hearing, Morocco called Tarkanian, admitted he had agreed out of spite to be the NCAA's source and asked for forgiveness. Morocco then voluntarily called the Nevada Attorney General's Office and offered to give a deposition as UNLV prepared for its appeal to the NCAA Council. Morocco told the attorneys during the deposition that, after Berst sought his help in investigating Tarkanian, he arranged to pick Kelley up at his home, take the former player to lunch and then get him to "talk trash" about Tarkanian. After lunch, Berst arrived and listened as Morocco and Kelley "discussed negative aspects of our stay at Las Vegas." Morocco also swore that it was he, not Kelley, who made the bulk of the allegations against Tarkanian during that meeting, but that he asked Berst to shield his identity by naming Kelley as the NCAA's informant. "The discussion actually consisted of a series of events to which I would make reference and to which Jeep would briefly respond," Morocco said in his affidavit. "I was clearly doing nearly all the talking and Jeep merely responded to my discussions." Morocco said he also arranged for Berst to interview several other witnesses, including Kelley's aunt,

Frances Parker, who was livid when Tarkanian allowed Kelley to quit the team as a freshman. "I called Mrs. Parker and made it clear that I had a strong dislike for Tarkanian and the university and very much reinforced her own bitter feelings toward them," Morocco swore. "I strongly encouraged Mrs. Parker's bitterness and suggested that she might want to speak with the NCAA since she felt that Jeep had been unfairly treated by the university and Tarkanian."

Four years later, in his deposition taken as part of Tarkanian's legal battle, Berst acknowledged that it was Morocco who arranged and hosted the hour and a half meeting between Berst and Kelley at the Monroeville, Pennsylvania, Howard Johnson's, where Morocco had taken a job managing a rental car counter after being fired by Tarkanian. Berst also admitted that he had visited Morocco at the Howard Johnson's "5 or 6 times," had called him another 10 times and, not surprisingly, had undersold the involvement of the disgruntled ex-coach to the Committee on Infractions. Asked by Tarkanian's lawyers if he had "interviewed anybody in the UNLV case who told you more about possible violations than Tony Morocco," Berst conceded, "I don't think so."

"Berst needed to make the Kelley allegations stick," UNLV attorney Mike Leavitt said. "I'm sure he realized that if the committee knew the source was a fired and disgruntled coach who had been let go because he was disruptive to the team, it might have misgivings. So he pinned the allegations on Jeep. And in the process, he fashioned his so-called 'evidence' to conform with his needs."

When Sonny Vaccaro, a childhood friend of Morocco's, heard through the grapevine that Morocco was the NCAA's chief witness against Tarkanian, he decided the NCAA might need a little lesson in history. Vaccaro, who today is Nike's chief liaison with basketball coaches, was caught in an awkward position; it was he who had recommended that Tarkanian hire Morocco when Tarkanian was still at Long Beach. Now Morocco had turned on Tarkanian, jeopardizing friendships all around. Vaccaro decided to write NCAA investigator McMenamin a confidential letter "explaining Tony's background" and warning the NCAA that Morocco shouldn't be considered a credible source. In the three-page letter, Vaccaro took McMenamin through his friend's coaching career – which included brief stops at Trafford (Pennsylvania) High School, the University of Iowa, St. Francis College and the University of Arkansas, before he landed a spot on Tarkanian's staff – and detailed how each of those jobs had ended with Morocco criticizing his former employer.

"Mr. McMenin [*sic*], as a former FBI agent and knowing what it takes to make a character analysis of a human being, you can follow probably more so than I a situation which exists within this individual which shows his instability, envy and disloyalty wherever he has been," Vaccaro wrote. "As I look back at all of this and my part in helping Tony obtain new jobs and be accepted by new people, I feel a partial responsibility in what has occurred. If my providing this information can in any way prevent one more program or one more human being from being unjustly hurt in the way so many have

in the past due to Tony's actions, then I will feel my sharing this was worthwhile."

Berst also asked Lew Schaffel, Rodney Parker's lawyer in New York, about Morocco's credibility. The answer was much the same. "If you're going to base your case on Tony Morocco, I think it would be a shame," Schaffel told Berst, according to Schaffel's recollection of the conversation.

* * *

LAS VEGAS SUN Friday, June 15, 1984

NCAA Tried to run Tark off the floor

By BOB PALM
SUN Staff Writer

NCAA officials planned to run Jerry Tarkanian out of coaching, according to testimony revealed in District Court Thursday.

The accusation, made by Norman Sloan, former head basketball coach of North Carolina State University who now is at the University of Florida, in October of 1978 to a House of Representatives Oversight and Investigation Committee looking into the practices of the NCAA enforcement branch, was read into court records during Tarkanian's hearing.

NCAA officials planned to run Tarkanian out of coaching, said Sloan, because they believed he had tried to discredit several of the organization's investigators by having them arrested in a Las Vegas hotel room with prostitutes and planted drugs.

Sloan said that he and William Hunt, a top official with the NCAA enforcement branch, were sitting in his office in late 1973, and Hunt said the NCAA was " 'not only going to get him (Tarkanian), but was going to run him out of coaching.' "

Sloan said Hunt then told him that the NCAA had information that Tarkanian had planned to plant some drugs in a hotel room and have NCAA investigators, specifically David Berst, who had been investigating Tarkanian since 1971, arrested in the company of prostitutes, and use the arrest to blackmail the NCAA to drop its investigation.

Tarkanian took the witness stand after the reading of Sloan's testimony and said he had only heard of the charge twice before.

He said one day he and his assistant coaches were standing outside the UNLV gym talking about an upcoming visit by investigators, and Tony Morocco, an ex-assistant coach, jokingly said that the investigators should be set up with drugs.

Hunt is expected to take the witness stand Friday to dispute the accusation. He already has said as much to the House committee. He told the committee he had not learned about the possible frame of his investigators until Feb. 25, 1975, two years after Sloan said he had made his statement about Tarkanian.

In earlier testimony, Berst revealed that Morocco, who later opened a car rental agency in Pennsylvania, became one of his confidential informers after he left UNLV. He said at least eight violation charges leveled

against the university and Tarkanian were based on information he had gotten from Morocco.

Sloan, who said he had just come off of a one-year probation imposed by the NCAA for the 1972-1973 basketball season, later denied to Warren Brown, at the time chief of the NCAA enforcement branch, that Hunt had told him anything about a frame. That was in a telephone interview.

However, he later told the House committee and Tarkanian's attorneys that his original accusation was the truth and that he had denied it to Brown because:

" 'The NCAA can get anybody it wants at anytime, and I believe that with every bone in my body. The NCAA is very powerful and has a great deal of influence over coaches.' "

The trial, before Judge Paul Goldman, will determine whether a 7-year-old permanent injunction is lifted, permitting the NCAA to push for suspension of Tarkanian.

The trial started Monday, seven years after the NCAA sought to suspend Tarkanian as the UNLV basketball coach.

Tarkanian saved his job by filing a friendly suit against UNLV in 1977 and obtained a permanent injunction that blocked UNLV from carrying out the NCAA-mandated suspension. On appeal, the Nevada Supreme Court said the NCAA also should have been been named in Tarkanian's suit and ordered the case retried.

Lyle Rivera, former Nevada deputy attorney general, testified that an adversarial relationship developed

between the NCAA and UNLV during the year he prepared legal responses to some 80 allegations against the school.

Rivera said he received almost no cooperation from the ruling body of collegiate sports when he asked repeatedly for information on its procedural process. Rivera, whose independent investigation showed no evidence of wrongdoing by UNLV, said despite his requests the NCAA provided no guidance on how to proceed in the quasi-legal arena with the infractions committee.

"I was told it was non-adversarial." Rivera said "All my experience was adversarial and all of my contact with the NCAA was adversarial."

Rivera's testimony came during cross-examination by NCAA attorneys.

NCAA President Opposes Bill of Rights

UPI 08-05-90 09:08 ped

NCAA president opposes "Coaches Bill of Rights"

By SY RYAN

RENO, Nev. (UPI) – Legislation before Congress calling for a "bill of rights" for coaches and athletes would cripple the NCAA's ability to enforce its rules, NCAA President Albert M. Witte said Sunday.

"In effect, it would give carte blanche to schools to violate rules without fear of NCAA sanctions," said

Witte, in Reno to attend the Summer Symposium on Athletics sponsored by the University of Nevada.

Witte was asked to comment on legislation introduced last week by Nevada's Democratic congressional delegation, upset by the NCAA penalties against Nevada-Las Vegas for 13-year-old recruiting violations.

The legislation will require the NCAA to adhere to due process before suspending or reprimanding a team, coach or player. Sen Richard Bryan, D-Nev., said UNLV Coach Jerry Tarkanian, the players and fans were dealt with unfairly when the NCAA Infractions Committee decided recently to impose an additional year of sanctions.

UNLV's national champion basketball team will be barred from postseason play next year, which means the Runnin' Rebels can not defend their NCAA title.

Sen. Harry Reid, D-Nev., said until now the NCAA has had the power to declare players and coaches guilty until proven innocent.

"That's completely contrary to every due process principle of American law," Reid said.

Witte said the legislation appears to deprive the NCAA of its rights by already deciding it is guilty of violations.

There have been similar bills introduced in state legislators where schools have been under investigation or have been disciplined by the NCAA, said Witte.

"They would have created as many or more problems than they resolved," he said.

Witte, a law professor from the University of Arkansas, said that instead of legislation he favored a study by the NCAA of its enforcement code.

"I'm not happy with the way things have developed," said Witte, who added his jurisdiction as president does not include the Infractions Committee.

He said he has had "some concern for a long time" with how the process is handled, but he opposed congressional action.

With the "concentrated criticism" being launched not only in Nevada but in other states, Witte said he thinks it is time to start the study. But he said it should not begin until investigations of Illinois and Missouri have been completed by the Infractions Committee.

There may be some move at the 1991 NCAA convention in January to look at the issue, he said.

In defense of the Infractions Committee, Witte said school presidents in a special meeting had voted for tough penalties for violations. He said the Infractions Committee was carrying out the wishes of the presidents.

But he noted that stiff penalty is different from due process.

Witte said schools which felt they were delt [sic] with unfairly in the past would have a chance to present their views to any study committee.

Las Vegas Review-Journal/Friday, October 12, 1990

NCAA official disputes Revel support group's statement

By Bruce Pascoe
Review-Journal

A group supporting UNLV's efforts to get back into postseason play has upset the NCAA over wording of its flyer, according to an NCAA official.

The Running Rebels Right to Return Committee, a group claiming nearly 100 part-time volunteer supporters, has been distributing flyers that solicit donations to help gather legislative and public support for UNLV.

However, in its flyer, the "R Committee" paraphrases from a 1979 congressional hearing:

"In 1979, the NCAA promised Congress it would impose no penalties against UNLV because a valid court order prohibits suspension of the Coach."

According to Jim Marchiony, the NCAA's director of communications, that statement is false.

"The Infractions Committee never promised Congress anything like that," Marchiony said. "Congress certainly talked about the case, but Charles Alan Wright (then head of the Infractions Committee) never said what they're making him say."

But G.R. Fitzgerald, "R. Committee" director, sticks to the flyer's statement. Fitzgerald points to a quote attributed to Wright in UNLV's appeal that was delivered to the NCAA in August.

In the appeal, drawn up by UNLV legal counsel Brad Booke, Wright's statement is prefaced by a statement from William J. Flynn, then president of the NCAA, that said Wright's opinion should be given careful consideration.

Wright is later quoted as saying to Congress, "I would think it would be utterly outrageous if in that circumstance the council were to say, 'Well, inasmuch as the penalty against Coach (Jerry) Tarkanian has fallen, we have to do something else against the University of Nevada at Las Vegas.' "

Fitzgerald said Wright's statement implied a promise not to further penalize the Rebels, although he said he did not quote direct use of the word "promise." He also said the statement was in direct contrast to a letter by Marchiony written Sept. 21 to disgruntled Rebel fan Robert Goldberg of Henderson.

According to the letter, which the "R Committee" provides prospective supporters, Marchiony wrote, "Since the university has indicated it is still unable to implement the penalty to bar its head basketball coach from the athletics program for two years, the committee faced the burden of determining an appropriate replacement sanction."

In addition, Booke said the flyer's statement was not too far off.

"I think the word 'promise' is not used, but they didn't leave too much room for inference," he said.

However, the group does have some differences with Booke and UNLV. It is not affiliated with the university

and supports the idea of Congress implementing NCAA procedures guaranteeing due process.

"Our point . . . is that the NCAA has got to be stopped," Fitzgerald said. "I think they're worse than the Mafia or organized crime. . . . I'd like to see them smashed into a thousand pieces."

Booke doesn't go as far. In fact, he wrote in the appeal that by abandoning their words from 1979, the NCAA might invite Congress to step in – which he said would hurt in the long run.

"(Congress' involvement) might provide the short-term benefits of getting the university in the tournament." Booke said. "But in the long term, clearly, it would not benefit us by having Congress oversee them."

But in any case, the "R Committee" has not strayed from its primary goal of getting UNLV in the NCAA Tournament. So far, Fitzgerald said, it has raised about $36,500, 80 percent of which is coming from its own volunteers. However, he said donations had slipped since the NCAA's announcement that it would rehear UNLV's case.

Fitzgerald said the money had been used for advertising and to distribute its materials – which it hopes influence Congress to put pressure on the NCAA to allow UNLV to play.

"We try to stay as factual as we can without interjecting our opinion," he said. "If everybody read the appeal,

they'd understand. But, unfortunately, they just get bits and pieces of it."

Tuesday, April 9, 1991/**Las Vegas Review-Journal**

Governor signs NCAA due-process bill

By Ed Vogel
Donrey Capital Bureau

CARSON CITY – Saying the NCAA has been "unfair" in its punishment of the UNLV basketball program, Gov. Bob Miller signed a law Monday to require the college athletic governing organization to use "due process" legal procedures.

In signing the law, Miller said he did not think it was fair for the National Collegiate Athletic Association to penalize the UNLV athletic program more than 13 years after alleged infractions occurred.

"I don't think that action was fair or equitable," said Miller, a basketball fan and Rebel backer. "It is a totally different athletic program with totally different athletes."

Rich Hilliard, the NCAA's director of enforcement, said that the NCAA already provided due process. He said an accused school is given access to all documents and information gathered by the enforcement staff and said it has the opportunity to interview witnesses.

Hilliard, who said the NCAA did not lobby Nevada legislators, said it is up to the organization's membership to decide how to react.

"It's a continuing issue that must be reviewed by the entire membership, all 800 members," Hilliard said. "We have to consider what you do when a state law is passed that is in conflict with current NCAA legislation. You can speculate until you're blue in the face, but until the members review it, that's all it is – speculation."

UNLV was ordered by the NCAA to suspend Coach Jerry Tarkanian, and the basketball team was sanctioned for violations in 1977. Tarkanian, however, secured a court injunction, blocking his dismissal and fought the suspension all the way to the U.S. Supreme Court.

In a 5-4 decision, the high court ruled that the NCAA was a voluntary organization that did not have to follow due-process procedures. The NCAA then banned UNLV from participating in this year's national basketball championship tournament to complete its punishment from 1977.

UNLV appealed the decision and was permitted to compete. It must sit out of the postseason tournament next year.

"Tarkanian will be happy," said Assemblyman Jim McGaughey, R-Las Vegas, as Miller signed the bill.

The NCAA's move to prohibit UNLV from next year's tournament amounts to "double jeopardy" that should be prohibited by law, McGaughey added.

McGaughey was the primary sponsor of Assembly Bill 204. The measure will require the NCAA, in future

investigations of college athletics in Nevada, to permit attorneys to represent those accused of infractions and allow the cross-examination of witnesses who make allegations about wrongdoing.

"The NCAA should adhere to the same procedures of law as any other organization," Miller said.

McGaughey said a similar law has been approved in Nebraska, and 12 other states, mostly those whose athletic programs have been punished, are considering the legislation.

McGaughey doubted that the NCAA could take any action against Nevada universities in retaliation for the due process law. Any move to prohibit UNLV from NCAA-sponsored events would have to be carried out by member schools, or other universities.

"I can't think of any other school voting to throw a university out for wanting its due process rights," McGaughey said.

Miller and McGaughey questioned the NCAA's recent imposition of one-game suspensions against various UNLV basketball players who committed minor rules violations.

McGaughey said the NCAA tends to be "selective" in its punishments. He said it punishes UNLV, but only slap colleges such as UCLA on the wrist for more serious violations.

In rapping the NCAA, Miller emphasized he was speaking about its treatment of UNLV in past violations. He said he cannot comment on the continuing NCAA investigation of would-be player Lloyd Daniels, who

never played for UNLV but who came to the college after a UNLV assistant coach had been appointed his legal guardian.

Las Vegas Review-Journal
LAS VEGAS SUN/February 29, 1992

Partisans clash in front of regents

UNLV'S ruling board listens to arguments over Coach Jerry Tarkanian's future with the Rebels.

By John Gallant
Review-Journal

Backers of UNLV basketball Coach Jerry Tarkanian and university president Robert Maxson squared off Friday for a second day in a row on the campus, this time taking their case to the University and Community College System of Nevada Board of Regents.

Regent Joe Foley of Las Vegas began the public hearing by condemning the Tarkanian backers, many of whom were wearing "Keep Tark, Fire Maxson" T-shirts.

Foley said the turmoil over Tarkanian's departure is devaluing University of Nevada, Las Vegas, degrees "by sending a message to the world that the university is not run by its president, but by its basketball coach.

"What we are engaged in now is a struggle for the very soul of this university," he said. "For the good of the university, for the good of this community we cannot lose this struggle."

Foley's statement was greeted by boos and shouts of "You're history" from the Tarkanian forces and by applause from a contingent of staff and faculty who had been urged in campus fliers to attend the meeting to defend academics.

One of the faculty members, Peter Starkweather, explained to the board why they were there.

"Many of my colleagues feel an attack on Bob (Maxson) is an attack on us and an attack on Bob is an attack on academics," he said.

But Jackie McCall, one of the leaders of the keep Tarkanian effort complained that taxpayers' money was paying for the flyers and computer mail used to rally support for Maxson.

She also said she had the names of professors, staff and students who had been threatened with transfers and terminations because of their support for Tarkanian.

"Are you interested in what is right or what looks right?" she asked the board.

The Rev. Marion Bennett, a former state assemblyman, accused the university of discriminating against blacks, saying there are only two tenured black professors on the university and not a single black professor serving on the 47-member Faculty Senate. There hasn't been a single black professor promoted to full professorship or given tenure during Maxson's administration, he said.

Referring to the university's designation by a newsmagazine as an up and coming university, Bennett said, "That should be an up and coming white university."

Maxson said afterward he couldn't confirm or dispute Bennett's allegations, but promised to look into it next week. He said the university does not discriminate against blacks, noting that at least four recently hired administrators have been black.

Aside from the boos and catcalls from the pro-Tarkanian group, there was little in the way of fireworks. The only incident occurred when attorney Pat Clary, who said he has collected 45,000 signatures in support of keeping Tarkanian, exceeded the two-minute time limit set by the board.

Clary refused to yield the microphone, saying that he spoke for 79 percent of the Las Vegans who said in a recent television poll they wanted Tarkanian to stay. Board Chairwoman Carolyn Sparks began pounding her gavel. Then she turned off Clary's microphone and called other speakers forward. But Clary kept talking.

It was only after more gavel pounding by Sparks that Clary finally yielded.

Clary was later followed by attorney Danny Tarkanian, the coach's son and a former UNLV basketball player, who argued the administration doesn't want to admit that the graduation rate of the basketball players is better than the university as a whole.

The team has had two Rhodes scholars and last year eight of the players were on the president's honor roll, he said.

"It hasn't become public because the administration and the regents don't want that to come out," Tarkanian said.

"No one in the men's basketball program is against academics." he added. "That's just what this adminisration wants you to think."

Tarkanian resigned June 7, 1991, effective at the conclusion of the 1991-92 season, but he rescinded the resignation Feb. 23.

Following the public hearing, Regent Lonnie Hammargren presented a series of questions and proposals for the board and staff about topics ranging from land for his planned aerospace museum to the attorney general's handling of the UNLV basketball ticket investigation.

Hammargren found little support for most of his points and verbally sparred at times with Regents Sparks and Dorothy Gallagher.

But the regents did agree on Hammargren's call for Attorney General Frankie Sue Del Papa to follow up her ticket investigation and provide a status report. As part of the request, Hammargren also demanded the attorney general provide a report on whether the university staff cooperated in the investigation.

Many of the Tarkanian backers leaving Friday's hearing agreed little had been accomplished.

Maxson said afterward the hearing was embarrassing to him but necessary.

"It was important the regents allowed the people to speak their mind," he said.

LAS VEGAS REVIEW-JOURNAL

March 12, 1992

Rebel season ends in courtroom

A judge critical of the NCAA rules Rebel players have no legal right to play in the postseason tourney.

By Bruce Pascoe and Greg Bortolin

Review-Journal

The UNLV basketball season did not end with a buzzer, but with a judge's gavel.

District Judge Donald Mosley, saying the Rebel players had no legal right to participate in the NCAA basketball tournament, denied a request Wednesday by the players for a preliminary injunction to block NCAA sanctions.

Attorneys for the players indicated they would not continue to fight the case. Therefore, UNLV will not be included in NCAA Tournament bids, which are announced Sunday.

Mosley also most likely put a final end to the 15-year NCAA case against UNLV and former coach Jerry Tarkanian.

In a decision Mosley later called one of the most difficult of his career, the judge ruled the NCAA had unfairly punished the Rebel players for allegations dating back to the mid-1970s, but agreed with counsel for the NCAA and UNLV that the players still had no legal recourse.

"The issue is fundamental fairness," Mosley said. "My first instinct was that there was a wrong to these players. There must, however, be a legal cause of action. As a judge, I have to have a legal reason for what I'm doing."

But along with his decision, Mosley also issued a stern criticism of the NCAA, suggesting it should follow due process procedures and look for alternative ways to sanction schools other than penalizing players who had nothing to do with the infractions.

"It seems like a full-time job of the NCAA is to put out fires and one has to wonder why," Mosley said. "It would occur to me that maybe the NCAA should voluntarily use due process procedures, if for no other reason than to stay out of court."

The judge also said, "I must say the NCAA is a virtual monopoly. It must shed the mantle that it is a voluntary organization. To compete in college sports, it is mandatory to join. It is the only game in town."

Mosley's remarks were of no consolation to either the Rebel players or their attorneys, locally based Steve Stein and California attorneys Todd Boley and Henry Hewitt.

"We felt it was the duty of the court to correct abuses," said Boley, a specialist in civil rights cases. "Our case was not about the players' sanctions themselves, but it was against procedures and improper sanctions."

Saying the NCAA believed it was above the law, Stein added that Mosley's remarks meant little.

"It's not how you play the game," Stein said. "It's whether you win or lose. In this case, at least."

Rebel forward Evric Gray, one of the few players to comment, agreed.

"If it (the NCAA) wasn't fair, then we should be in the . . . tournament," he said.

Sophomore forward H Waldman, who said he was skeptical entering the hearing, was less critical.

"He listened to both sides fairly," Waldman said. "This is as fair as he could get. But in this case, the legal issue overrules the fairness."

Stein and Boley had argued that the players were being penalized for unfair sanctions in the first place, and also penalized because the sanctions were moved from last year to this year under an agreement reached by UNLV, the NCAA and Tarkanian in November 1990.

Steve Morgan, NCAA executive director, said he felt bad for UNLV's players and was uncomfortable with how the enforcement staff was described.

"Because of the judges' decision, we will take his comments into consideration," said Morgan, who oversees the enforcement staff. "I think there were some gross misrepresentations. Our interests are to uphold the rules."

Chuck Thompson, who technically was on the defendants' side as an attorney for Tarkanian, said Tarkanian offered not to coach the team in this year's tournament because he felt he was the object of the NCAA's penalty. Thompson also blasted the NCAA.

"It's a rather barbaric system that takes two decades to solve and penalizes someone else for the transgressions," Thompson said.

"Jerry Tarkanian had a bounty on his head for 20 years. The young men here are victims of that. This university had the choice of protecting its coach and players. Instead it decided to play within the rules of the system," he said.

"Coach Tarkanian wants the court to know he feels the players have the right to play."

But Peggy Leen, a local attorney hired by the NCAA, said Tarkanian's presence on the defendants' side was wrong in the first place.

"(It is a) preposterous notion that the head coach conspired with his arch rival, the NCAA, and his new rival, UNLV, to make an agreement," Leen said. "There's not a person in the state of Nevada, in the world of college basketball . . . and these kids don't believe that their coach would do something to hurt them."

Most of the arguments presented by Leen and UNLV counsel Brad Booke centered on the idea that the players have no right to play in the tournament, no matter what the circumstance. Leen cited a federal case in San Antonio to back her argument.

"You don't have a right to public education," she said. "If you don't even have a right to public education, how do you have a right to play basketball? It's a privilege, not a right."

Booke said it was UNLV's belief that it should stick to the agreement it made in November 1990 in order to

keep bad relations between the school and the NCAA from worsening and from continuing to drag out the 15-year-old case. He also questioned the timing of the case.

"It is neither appropriate nor fair for student-athletes to come in 15 months later and try to upset the agreement that was reached," he said.

However, Stein and Thompson said the players did not file the lawsuit until last Friday because the team did not know until it ran through the regular season with a 26-2 record that it would have a chance to participate in the NCAA Tournament.

"The NCAA used capricious Gestapo tactics," Stein said. "The enforcement division is the embodiment of evil."

With the players' suit settled, Booke will now work on the NCAA vs. Nevada suit in federal court Friday. In question is the constitutionality of Nevada's due process law passed by the 1991 Legislature.

"There is no sense of victory," Booke said. "As far as the university is concerned, perhaps there is a sense of relief. It is unfortunate that the penalties imposed 15 years ago against Coach Tarkanian had to be served by these student-athletes.

"It is good news for the university. Hopefully this case is now over."

LAS VEGAS REVIEW-JOURNAL

March 25, 1992

Regents reject independent probe

The board votes 5-4 to put an end to the UNLV controversy, but supporters of Tarkanian vow to keep on fighting.

By John Gallant
Review-Journal

State university regents closed the book on the UNLV basketball controversy Tuesday with a 5-4 vote against an independent investigation, but backers of former coach Jerry Tarkanian vowed to continue the fight.

Regents voting against an investigation into events surrounding Tarkanian's resignation said it should be up to the courts, where Tarkanian and his coaches could turn, to determine the truth.

"If Coach Tarkanian feels he has been wronged he has an opportunity to prove that in court," Regent Dan Klaich of Reno said. "In my opinion, it's time for members of this board to say, 'We've heard enough and it's time to get on with the business of running UNLV.' "

But backers of the investigation warned that voting it down won't make the controversy go away.

Regent Shelley Berkley of Las Vegas said state legislators have expressed interest in investigating the matter.

"If we don't clean our own house someone will do it for us," she said.

Regents Klaich, Carolyn Sparks of Las Vegas, Joe Foley of Las Vegas, Dorothy Gallagher of Elko and James Eardley of Sparks voted against the investigation. Those regents voting for a probe were Lonnie Hammargren of Las Vegas, Jill Derby of Gardnerville, June Whitley of Las Vegas and Berkley.

"I don't know how anyone would vote against that, particularly with all the doubts and the community being so upset." Tarkanian said early today from Chicago, where he was filming a basketball television special.

"I think the regents and everyone else would want to get the truth out to let the healing process begin," he said.

Tarkanian's supporters, many of whom had held a protest march on Maryland Parkway in front of the university on Tuesday, exploded in anger after the vote.

There were shouts of "You're history" and "The Legislature is going to take care of you." They also vowed revenge at the ballot box when regents face re-election.

The University and Community College System of Nevada regents met behind closed doors most of the day in a personnel hearing with university system legal counsel Brad Booke.

The attorney had worked for UNLV President Robert Maxson on questions about the basketball program's compliance with NCAA regulations. Some blamed Booke for reports that federal investigators were asking questions about the possibility of point shaving during the 1990-91 season.

The board didn't issue a statement about Booke after the closed-door hearing, although some regents said all or most of their questions had been answered.

Tarkanian himself was a surprise witness during the Booke hearing. The coach said he had planned to fly to Chicago on Tuesday, but delayed his flight after receiving an invitation to the hearing Monday evening from university system chief legal counsel Donald Klasic.

Tarkanian was excluded from the personnel session while Booke made his opening statement, which angered the coach's son.

Attorney Danny Tarkanian, who attended the hearing, said Booke wasn't excluded from the coach's personnel session with the board last June and he accused the board of continuing to cover up the facts in the case.

"I think the public is pretty much fed up with all these closed meetings," he told reporters waiting outside the hearing room.

Later, Danny Tarkanian said "I thought Booke did not look good. They asked him some very pointed questions and he had trouble answering them."

The coach was calm beforehand, but after meeting with the regents for nearly an hour he made a hasty exit from the hearing room, telling a television cameraman to get out of his way and refusing to answer reporters' questions. In the interview from Chicago, Tarkanian said he wasn't angry when he left the meeting, but was only hurrying to catch his plane.

Danny Tarkanian and attorney Alan Jones said they hoped action toward an investigation would be taken at

Thursday's Legislative Commission meeting in Las Vegas. The panel meets every several weeks when lawmakers are not in session to handle legislative business.

"We'll see what happens," Danny Tarkanian said, "The first set of public officials hasn't followed the feeling of the people. Now we'll see what the next set does."

Jones said he was very confident of an investigation, adding that a legislators' probe would have the subpoena power a private board would not.

"Because the Legislature is also responsible for funding the university system, they have a legitimate right to look into the quality of the operations of the president's office, the university system's counsel and the athletic department," Jones said.

Jones said the fact that the regents were divided over whether to have an investigation may influence the legislators.

Another of Tarkanian's attorneys, Chuck Thompson, said the regents' split vote meant support for Maxson and the UNLV administration may be slipping.

"I think this is an indication that this administration is in a lot of trouble." he said, "But they've obviously got some willing to risk their political careers for them. They're like lap dogs eating out of (Maxson's) hands."

Foley, who refused to attend Booke's personnel hearing, called it illegal because the board oversees the university and college presidents and the chancellors, but not their employees.

Review-Journal writer Bruce Pascoe contributed to this report.

Las Vegas Review-Journal

Thursday, September 16, 1993

All systems still go for NCAA

UNLV says individuals will not be affected by processing the case that involves Jerry Tarkanian.

By Bruce Pascoe
Review-Journal

Accusations, denials and threats of litigation keep flying from both sides over the Jerry Tarkanian-UNLV case, but this much appears to be sure:

The NCAA doesn't care.

The NCAA's Infraction Committee will still review UNLV's proposal for a summary disposition to solve the school's infractions case as scheduled this weekend in Denver, spokesman Jim Marchiony said. A final decision with a penalty may be handed to UNLV within a few weeks.

Also, Kathy Freberg, one of Tarkanian's Santa Ana, Calif.-based attorneys, said she received a letter from NCAA enforcement director Mark Jones on Wednesday confirming UNLV and the NCAA enforcement department are recommending the infractions committee go forward.

"I just hope (the letter) will be food for thought for the infractions committee," Freberg said.

If the infractions committee does go ahead, count on more litigation: Freberg said she and other attorneys will seek an order in Nevada District Court to show cause why the NCAA should not be held in contempt of court.

"We're going to wait until they trip over their feet," said local attorney Steve Stein, who represents several former Rebel players. "And then we're going to shove it in their mouths in the courtroom."

Freberg already tried to stop the process by writing Jones on Monday, saying the fact that Nevada's due process statute is pending in the Ninth Circuit Court of Appeals makes it "incomprehensible" the case be solved now.

Freberg also said the university and the NCAA were permitted to process the case against UNLV only, but instead, UNLV has admitted to violations Tarkanian was responsible for.

UNLV counsel Brad Booke, meanwhile, said the school will solve the case without names mentioned and said results won't become public until all sides have had a chance to defend themselves.

"The only way the individuals can be hurt is if they keep protesting so loudly, so much so that they appear guilty," Booke said, "After the due process issue is finalized, if these individuals want to go to the Infractions Committee, they will be free to do so and the only evidence that will be considered will be what they present and what the enforcement staff presents."

But Freberg and other Tarkanian supporters say any admission of guilt by UNLV implies guilt by Tarkanian, his former staff members or his former players.

Similarly, according to sources, Stein is upset about a potential violation in which former Rebel Stacey Augmon paid rent that was determined to be below market value.

Stein said he was not told of any admitted violations by players and said they would be harmed unfairly if UNLV said they were guilty.

"Of course it's implied," Stein said. "If the university stands up and admits that a student-athlete lived in an academic adviser's home and paid what they admit is less than fair market value, do you think the student-athlete can be implied guilty? Do you think he can defend himself? Don't you think his attorney ought to know?"

Besides, Freberg said, it will be more difficult for Tarkanian or another individual to defend himself after the Infractions Committee has already ruled on it.

"It's kind of a joke around here," she said. "We're not calling it a 'summary disposition.' We're calling it the 'summary execution.' "

Booke maintains UNLV has the court-upheld right to move ahead. Because of the Tarkanian's insistence on due process proceedures [sic] being followed – the case is still under appeal – he has chosen not to participate.

"They have put up their own roadblock and now they're complaining that a roadblock is in the way," Booke said.

Booke also said he kept in "constant contact" with Tarkanian attorneys and providing copies of all drafts of the proposed findings, though he is accused of not telling them about new admissions of guilt after meeting with NCAA enforcement staffers this summer.

Las Vegas Review-Journal

November 9, 1993

NCAA to announce UNLV fate

The NCAA will release its decision on UNLV's 8-year-old infractions case this morning by telephone.

By Bruce Pascoe
Review-Journal

After years of legal delays, the NCAA infractions case regarding UNLV's basketball program is finally scheduled to be settled today.

The case, started in 1986 after a Newsday report triggered allegations concerning the recruitment of troubled New York City standout Lloyd Daniels, will be settled via the "summary disposition" process, which is a quick negotiation between the school and the NCAA's enforcement staff.

The NCAA's Committee on Infractions will ultimately accept or alter the negotiated settlement and its chairman, David Swank of the University of Oklahoma, will announce its decision this morning via a teleconference call.

UNLV will hold an 8 a.m. news conference at the Tam Alumni Center.

"We're pleased that we're going to finally be able to put this to a close so we can channel our energies into other areas," UNLV athletic director Jim Weaver said Monday. "We've been working to put it to a resolution, and we hoped we could have had it done by last Friday

or Saturday, but just from getting everything written and ready, (today) is the first day we could get it done."

However, allegations against former UNLV coach Jerry Tarkanian and other individuals in the case will be settled later because of a conflict between Nevada's due process law and standard NCAA guidelines.

Jack Kitchin, a Kansas City-based attorney for the NCAA, said Monday he didn't think any future decisions against Tarkanian or other individuals would affect the current basketball program.

But Kathy Freberg, an attorney for Tarkanian, said any ruling that implied wrongdoing by Tarkanian would be legally challeged [sic] if the Nevada due process law is allowed to stand. It was declared unconstitutional by U.S. District Judge Howard McKibben on June 5, 1992, and an appeal was heard Oct. 5 by the 9th U.S. District Court of Appeals.

No decision has been issued yet on the appeal, and Freberg wouldn't comment on whether she would pursue action if the appeal was thrown out.

"The university is well aware we have a suit against it, and the NCAA is well aware we have a suit pending against UNLV," Freberg said. "If this action in any way harms Coach Tarkanian, then both of them will be held liable."

Meanwhile, the Rebel players, many of whom were in elementary school when the investigation began, are taking their standard business-as-usual approach, according to senior guard Dedan Thomas.

"We haven't thought about it yet," said Thomas, the team's captain. "We haven't really talked about it a lot this year."

UNLV coach Rollie Massimino said he has expected to get the issue settled before Wednesday, the first day of the fall signing date for recruits. At least one of his potential signees, 6-foot-10 Monte Hardge of Jefferson City, Mo., may weigh the outcome in his decision. Hardge is also considering Missouri.

Although the infractions committee was originally going to review UNLV's proposal in mid-September, it backed off. Yet, it still promised to try to settle the case by the early signing date, Weaver said.

The case originally had 34 allegations when it was handed over to UNLV officials for response in December 1990. A supplemental inquiry was added in 1991, bringing the total of allegations to about 40.

On June 17, UNLV and the enforcement staff met at NCAA headquarters near Kansas City, settling on 28 allegations and agreeing on a proposed penalty. Among the penalties proposed by UNLV was giving up two road games, at Louisville and at Marquette, in exchange for not being kept from next year's NCAA Tournament.

UNLV officials also argued that several current Rebel players had already been punished by sanctions during the 1992 season, when the 26-2 Rebels were kept off television and out of the NCAA Tournament.

Tarkanian's attorneys have implied that a light ruling against UNLV today will be used against the school in

Tarkanian's lawsuit against [sic]. The lawsuit is based on Tarkanian's contention that he was unfairly ousted as the Rebels' coach.

Longtime Tarkanian attorney, Chuck Thompson, who was involved with the early stages of the case, said the NCAA has proven it is going out of its way for UNLV.

"I'm sure there are going to be some hernias in Kansas City tonight from the NCAA bending over backwards to help their friends at UNLV," Thompson said.

Las Vegas Review-Journal and Las Vegas Sun

Sunday, March 24, 1996

Coach

Readers' Pick:
JERRY TARKANIAN

Gone, but never forgotten – that's obviously the message from Review-Journal readers still carrying a torch for UNLV's most famous (and, some would say, infamous) ex-basketball coach. Three other coaches have assumed Tark's mantle since his departure, but it looks like some folks still haven't recovered from his long and tempestuous reign at the former Shark Tank, the Thomas & Mack Center. In the race for second place, Thunder honcho Chris McSorley – whose IHL squad could very well wind up with a championship this year – skated past UNLV basketball coach Bill Bayno by a thin-as-ice margin of two votes.

Las Vegas Review-Journal and Las Vegas Sun

Sunday, October 20, 1996

Archaic NCAA wrote the rule book on stupidity

MIAMI – We should be immune to the idiotic by now.

I mean, that screaming, pony-tailed guy on late-night television becomes rich by reinventing the sit-up. Pauly Shore and that Hey-Vern buffoon named Earnest somehow keep making movies. And don't even get me started on The Multi-Millionaire Formerly Known As Prince comparing himself to a slave.

But today we can thank the NCAA – an organization that governs institutions of higher learning, mind you – for raising the bar on stupidity.

(Old Sugar Ray Leonard is trying mightily to touch said bar, but he is too rickety to reach it.)

When Florida State beat Miami for the third time in five years, Hurricane Kenny Holmes lost a harmless bet to two longtime Seminole friends. But it wasn't bad enough that Holmes had to give up his UM jersey. The NCAA briefly took away his eligibility, too.

Dan Le Batard

No gambling, the prehistoric NCAA ruled. It reversed the ruling Friday, after Miami appealed, but why does it have to come to that? Don't these NCAA suits have anything better to do? Doesn't it say anything about logic anywhere in that too-thick rule book of theirs?

Why is that the bookstore can sell Holmes' jersey for $59.99 – part of the proceeds going to the NCAA, none of the proceeds going to Holmes himself – but Holmes isn't allowed to give his own No. 90 away?

If The Multi-Millionaire Formerly Known As Prince wanted to know about real slavery, he would become a college football player. These kids don't have the rights the rest of us do. You can bet your shirt; they can't. You can work during the football season; they can't. You can accept money from an old college roommate; they can't.

Two mayors from competing cities can make a bet on big games, and it's considered cute. Two college football players do it, and it's considered illegal. But, hey, you have to be more careful with corruptible college kids, right? It's not like, say, a Miami city official would ever graduate from betting to bribery.

A Nebraska wide receiver is accused of manslaughter and the NCAA does nothing. A defensive end beats up his girlfriend, and the NCAA allows the school to administer punishment, even though some schools don't think punishment is appropriate because, you know, American law states that "you are innocent until proven guilty if you can score touchdowns." But, by God, there will be no players betting sweaty jerseys, not while the hypocritical NCAA is on the beat, even though the largest reason people watch college football is because they've bet on it.

This boobish behavior isn't new for the NCAA, of course. Last season, a Kentucky wide receiver named Harold Dennis, who had played in all of one game in his three-year college career, had agreed to sell the rights to his life story to a movie company. He hadn't accepted any

money, mind you, just agreed to receive some sort of compensation when a movie was made, if a movie was made.

Dennis was badly burned in a 1988 bus crash that killed 27 people, and his story was one of inspiration. He made the team as a walk-on before receiving a scholarship, but the NCAA wouldn't restore his eligibility until he promised to cancel his movie contract.

Perfect, huh?

A wonderful story about athletics.

Banned by the NCAA.

Dan Le Batard is a columnist for the Miami Herald.

The Las Vegas Review-Journal
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Tuesday, February 8, 1994

Tarkanian wins judgment against UNLV

Carrie Geer

Photo. **JERRY TARKANIAN** Victorious in courtroom

A Las Vegas judge rules that the university officials must pay $250,000 for the ex-coach's legal expenses.

University officials must pay $250,000 in legal costs incurred the past two years by former UNLV basketball coach Jerry Tarkanian, even though he made his 1991

request for legal defense five days late, a judge ruled Monday.

"There can be only one conclusion," District Judge Myron Leavitt wrote in his decision. "The refusal to pay Coach Tarkanian's legal expenses was willful and unreasonable and that the defenses asserted by defendants to avoid payment . . . were done to harass him."

Tarkanian was in San Diego on Monday and could not be reached for comment.

"We are very pleased, and we are very pleased for our attorneys, because they have worked hard on our case," Tarkanian's wife, Lois, said Monday afternoon.

Lois Tarkanian said she had not yet discussed the judge's decision with her husband.

"It lays some groundwork for understanding what has been done to us," she said of the ruling.

Tarkanian, who resigned in June 1991, filed a separate lawsuit in September claiming that UNLV administrators and university regents conspired with NCAA investigators to ruin his college basketball career.

Leavitt listened to testimony during a three-day trial that ended Friday before ruling on the former coach's request for payment of legal costs.

The judgment includes about $23,000 for legal costs Tarkanian incurred during the NCAA's 1990-1991 inquiry of alleged infractions by the UNLV basketball program. At the beginning of last week's trial, university attorneys acknowledged they owed this amount.

The judgment also includes about $160,000 for legal costs Tarkanian incurred after the NCAA filed suit on Nov. 12, 1991, in U.S. District Court seeking to declare Nevada's new due process law unconstitutional.

Only the governor and those who had demanded the NCAA follow the law were named in the suit. The law was later ruled unconstitutional.

State law requires university employees to submit a written request for legal assistance within 15 days from the time they are served with a lawsuit related to their work, but Tarkanian made his request after 20 days.

Leavitt noted in his decision that UNLV paid the legal fees and costs of three other defendants in the NCAA suit, although one submitted a late request. The judge also found other instances in which the university provided a defense for employees after receiving only an oral request.

In addition, Leavitt said the University of Nevada's assistant general counsel, Brad Booke, reaffirmed an existing oral agreement to pay the legal costs and attorney fees of individuals named in the official inquiry during a meeting with attorneys on Dec. 24, 1990.

University attorneys drew a distinction between the NCAA inquiry and its subsequent lawsuit over the due process law.

Leavitt concluded, however, "that the due process case was merely an extension of the NCAA's desired goal to sanction UNLV and that the oral promise to pay Coach Tarkanian's legal expenses included the due process case."

"It is readily apparent to the court that Coach Tarkanian was treated differently than the other individual defendants in the official inquiry proceedings and the due process case," the judge wrote.

Leavitt also awarded Tarkanian about $68,000 for legal services incurred in his attempt to force the university to pay his legal bills in the due process case.

"We're in a doggoned situation where we're suing an institution that we really care a lot about," Lois Tarkanian said.

David Hintzman, assistant general counsel for the University of Nevada, could not be reached Monday for comment.

LAS VEGAS SUN Tuesday, March 5, 1991

Bill Prompts NCAA threat

Two Nevada universities could be
forced out of athletic association

By Geoff Dornan

SUN CAPITAL BUREAU

CARSON CITY – The Senate has given unanimous approval to a bill that would stop what its sponsors say are civil rights abuses by the National Collegiate Athletic Association.

The vote Monday came despite NCAA officials saying such a law could make it impossible for them to

operate in Nevada, possibly forcing the state's two universities out of the association.

Sen. Dina Titus, D-Las Vegas, raised the question of whether the bill would result in University of Nevada, Reno, and UNLV being barred from intercollegiate athletic competition. Senate Majority Leader John Vergiels, D-Las Vegas, said if that is the case, Nevada wouldn't be alone because some 15 states are considering similar legislation.

"I consider that extortion," Vergiels said. "The NCAA is not above extortion. They do it every day."

He said it was that kind of attitude which prompted the bill because the NCAA too often denies athletes and schools their rights under the cover of being a private, voluntary organization.

Sen. Ray Rawson, R-Las Vegas, who co-sponsored the measure, said the bill was designed simply to apply the principles of due process to the NCAA. In a free society, he said, "this bill becomes almost mandatory."

Rawson said the threat that passing a due-process requirement would bar the state's universities from participating in NCAA sports would probably be eliminated by legislation in the U.S. Congress.

The issue was raised in Nevada by the NCAA's 13-year-old war with the UNLV basketball program and its coach, Jerry Tarkanian.

In testimony before the Human Resources Committee, lawyer Chuck Thompson, representing the UNLV coaching staff, instead NCAA investigators won't allow witnesses or defendants to record any interviews with

them; don't allow the accused to see the charges and evidences against them; and repeatedly violate due-process requirements imposed by the U.S. Supreme Court.

He also said its investigations are conducted behind a veil of secrecy and give the accused little if any chance to properly defend themselves.

Yet, he said, the organization has the power to "destroy careers, stop players from playing at any time and impose sanctions on schools that cost them millions of dollars."

He said the NCAA's enforcement division "has committed affronts to the Constitution for years." Investigators have even lied about what was said during interviews, he said.

The committee recommended passage of SB202 which would require the NCAA to follow rules of due process in any investigation involving athletes or athletic programs in the Nevada's university system.

Human Resources Chairman Joe Neal, D-Las Vegas, said after the Senate vote Monday that the bill would have no effect on UNLV's championship hopes this season because it doesn't apply retroactively.

"We're not doing this to protect anybody," Vergiels told the Senate. "We're doing this because we think it's a fair way to process an action against an individual or a school."

A similar measure is being processed by the Assembly and is expected to come to a final vote later this week.

Thompson said during the committee hearing that SB202 will make sure the NCAA grants due process.

APPENDIX F

EXCERPTS OF VIDEOTAPED BROADCAST FILED IN RECORD IN COURT BELOW

15:32-16:27 (10/27/90, Channel 13)

Tarkanian to be profiled on "The West."

Broadcaster: "A man who some will tell you has more power than anyone else in our part of the country is the subject of a story to be broadcast across our part of the country tonight. Jerry Tarkanian . . . "

Al McGuire: "The biggest person in the state of Nevada is not their governor, or their senator or their school president or the people from their big hotel. It's Tark the Shark!"

16:29-17:54 (10/27/90, Channel 8)

Scott Higgins: "Now it's up to the NCAA to prove who they are really after. Jerry Tarkanian bent about as far as he could without breaking yesterday [by giving the NCAA four alternatives to banning the Rebels from post-season play] . . . "

Tarkanian: "We're in the right. If I'd had a fair hearing in 1977 this would never have happened . . . It just doesn't seem like it's the American way [for me to have to make so many concessions]."

Higgins: "It really isn't [the American way]."

18:02-19:16 (10/29/90, Channel 13)

Ron Futrell: "If the NCAA is true to its word, they'll take this perfect opportunity to help remove some of the perception [they're out to

get Tarkanian] by accepting one of the proposals UNLV has made. . . . Let's hope, let's hope . . . the NCAA takes advantage of this chance for them to save face . . . Yes, indeed, enough is enough."

20:17-20:53 (Channel 3)

Broadcaster: "Biggest news of the season . . . Rebels back in NCAA tournament."

Tarkanian: "Sometimes I think the NC2A is above the judicial system. They may be the only organization in our country that's above the judicial system."

20:55-22:04 (Channel 5)

Tonia Ellis reporting on celebration that Rebels are in tournament. Rebel fans at airport and Inn Zone, celebrating that Rebels will defend their champion standing. "I jumped up and down. . . . As a fan, I'm all for it. . . . We love the Rebels."

22:12-23:20 (Channel 13)

Ron Futrell [re NCAA decision]: "It's over, it's done . . . enough is enough."

23:23-24:18 (2/27/91)

Ron Futrell: Players did not pay for incidental hotel visits amounting to approximately $25 apiece when they were in town on a recruiting visit, years ago. "But the key to this story is the NCAA says the charges are. . . . excessive. Excessive. . . . The NCAA feels they may be . . . excessive. I wonder what they get when they go on the road for the NCAA. . . . The players, by the way have paid for those incidental room charges that say were . . . excessive. Yes."

24:24-26:45 (circa 5/27/91, Channel 3)

Broadcaster: "Beyond a reasonable doubt can get you thrown in prison, but the NC2A can snuff out careers of college coaches and players with evidence that is a lot less reliable than that. Brad Booke will argue that the evidence is just too flimsy to find the school guilty" . . . NCAA process is not unlike the court system . . . the enforcement staff prosecutes, the university defends itself, the infractions committee . . . is the judge. But in court, hearsay evidence is illegal, witnesses are sworn to tell the truth, and the jury is told to vote guilty only if the evidence is beyond a reasonable doubt. Not so with the NCAA . . . "

APPENDIX G

IN THE DISTRICT COURT OF
CLARK COUNTY NEVADA

JERRY AND LOIS TARKANIAN, Plaintiffs,	)	No. A314006
v.	)	DEPT. NO. 10
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL. Defendants.	)	DOCKET NO. K

AFFIDAVIT OF KENT L. TEDIN

Kent L. Tedin being duly sworn says:

1. My name is Kent L. Tedin. I live at 5808 Annapolis, Houston, Texas.

2. I received a Ph.D. in political science from the University of Iowa in 1973. I am currently professor of political science and chairman of the political science department at the University of Houston. My major academic fields are public opinion and statistics. I teach both subjects at the graduate level. I am coauthor (along with Robert S. Erikson) of the best selling textbook on public opinion, *American Public Opinion: Its Origins, Content and Impact*, 5th edition (New York: Allyn-Bacon, 1995), and have published articles in every major peer reviewed political science and public opinion journal. Either alone or in collaboration I have conducted over 150 public opinion surveys. A substantial number of these have been designed for litigation. I have previously testified in both state and federal court as a statistical expert and as an

expert on public opinion and the survey method for ascertaining public opinion.

3. Richard Murray and I designed the questionnaire and analyzed the data for the change of venue survey discussed in this affidavit. Murray received a Ph.D. in political science from the University of Minnesota in 1967, and is professor of political science at the University of Houston. He has published numerous works in the field of public opinion, and since 1978 has conducted opinion surveys on local and state-wide political races for the *Houston Chronicle*. Either alone or in coloration [sic] he has designed and executed more than 200 public opinion surveys. He has also testified extensively as an expert on the assessment of public opinion as well as on the Voting Rights Act.

4. I was asked to conduct a change of venue survey by James McLarney representing the NCAA in a suit brought against that organization by Jerry and Lois Tarkanian. I agreed to survey the adult population holding a current Nevada driver's license and residing in Clark County or Washoe County, Nevada. In the course of this affidavit we shall refer to these counties by their defining cities, Las Vegas and Reno.

5. The population in each of these venues is specifically defined as all adult citizens over the age of 18, who hold a current Nevada driver's license, have a telephone, and live in a county that is part of the specific court jurisdiction. Two random digit dial (RDD) samples were purchased from a commercial sampling firm, Genysis Sampling of Fort Washington, Pennsylvania. RDD insures that everyone in the population with a residential phone

number has an equal chance of getting into the sample, including those with unlisted numbers. The numbers for hotels and other businesses are screened out when the sample is created. Using this strategy, the sample is representative of the population within known limits of sampling error. Four hundred respondents were interviewed from each venue. Sampling error for a is plus or minus five percent.

6. The interviews were conducted by the survey unit at the Center for Public Policy at the University of Houston. The survey supervisor was Greg Van Yundt. The survey instruments were identical in both venues, save minor differences relevant to the specific venue. The interviewing was done between February 23rd and March 2nd, 1996.

7. Copies of the questionnaires are provided as separate attachments. Two separate (but near identical) questionnaires were used. The only difference concerned specifics of the particular venue, such as a question in one venue beginning with "In the Las Vegas area. . . . " would be replaced with a question in the other venue beginning with "In the Reno area. . . . "

8. When appropriate, statistical tests will be made by comparing respondents from the Las Vegas venue to respondents from the Reno venue. For example, if we are interested in seeing if there is a statistically significant difference between the Las Vegas and Reno venues on "attention to media coverage of the dispute" (Question 22) we will test for that possibility with an inferential statistic.

9. The test for statistical significance will, depending on the data, be either a chi square test, or a t-test for

differences in mean values. Differences between the venues can occur by chance, just like flipping an honest coin will not always yield exactly 50% heads. If we were to flip two silver dollars 20 times, and one silver dollar came up heads 11 times and the other came up heads 14 times, we would not conclude that the two silver dollars are really different. Rather, the difference we see in 20 coin flips is most likely due to simple chance.

10. In this study, for a difference to be attributed to a venue effect, versus simple chance, the difference must occur fewer than 5 in 100 times by chance (the .05 level of statistical significance). If the difference would not occur fewer than 5 in 100 times by chance, we shall infer there is no difference on the item between the venues. Levels of significance will be indicated as either $p.< .05$ or "n.s." for not significant.

11. Ten percent of all interviewers were validated. The survey supervisor called back 10% of the sample, confirmed the interview had taken place, and compared two demographic items (rent or own residence and marital status) on a "validation form" with the responses on the actual interview. The purpose of validation is to insure the interviews were, in fact, completed.

12. Frequently in change of venue surveys, it is only the venue of original jurisdiction that is surveyed, as often the publicity is local. There is an understanding by all parties that a distant venue would, for all practical purposes, be uncontaminated. But in some cases, the publicity is so widespread that all venues within a state are more or less affected. That is almost certainly the case in

Tarkanian v. NCAA. There will be some level of information and opinionation in all Nevada counties. Consequently, proposed new venues must also be surveyed.

13. Our practical standard for a suitable venue is one where the level of knowledge and information in a proposed new venue is significantly lower (would occur by chance fewer than 5 in 100 times) than the venue of original jurisdiction. Second, on specific issues we expect some opinionation. The standard for a new venue would be more "no opinon" or "unsure" responses than in the venue of original jurisdiction. Third, with respect to opinionation, the standard for the new venue would be a noticeably more even split on opinions relevant to the case than in the venue of original jurisdiction. Thus, in a suit over moving professional football franchises from one city to another, respondents might be asked:

Do you think owners of a professional football franchise have the same right to move to a new city as any other business, or do they have a greater obligation than other business to stay put.

We would view distributions like the one below as evidence for a change of venue from the original jurisdiction to the new venue. While opinionation exists, the playing field in the new venue is relatively level.

	Original Venue	New Venue
Football Franchise has same right to move	26%	27%
Unsure/No opinion	18	40
Football Franchise has obligation to stay put	56	33
	100%	100%

14. We began the Las Vegas/Reno surveys by asking respondents how interested they were in college football and college basketball. What we see is that Reno residents are more interested in college football, while Las Vegas residents are more interested in college basketball, as we might expect given the success of the UNLV basketball team.

QUESTION 1: How interested are you in college football?

	Not Interested	A little Interested	Somewhat Interested	Very Interested
Las Vegas	39%	20%	24%	17%
Reno	32	16	28	24

p.<.05

QUESTION 2: How interested are you in college basketball?

	Not Interested	A little Interested	Somewhat Interested	Very Interested
Las Vegas	34%	17%	23%	25%
Reno	41	17	26	16

p.<.05

We also asked if respondents agreed or disagreed with the statement that maintaining a ranked baseball program at UNLU is more trouble than it is worth. Many more in Las Vegas *disagreed* with this statement than in Reno, but what is noticeable is the very large difference between those who *strongly disagreed* in Las Vegas (43%) versus Reno (21%). Clearly college basketball, and a college basketball team at UNLV that plays in the major leagues is a

lot more important to residents of Las Vegas than to the residents of Reno.

QUESTION 15: Maintaining a ranked college basketball program at UNLV is more trouble that [sic] it is worth.

	Strongly Agree	Somewhat Agree	No Opinion Unsure	Somewhat Disagree	Strongly Disagree
Las Vegas	03%	12%	12%	**31%**	**43%**
Reno	07	17	21	**36**	**21**

p.<.05

15. Next, we compare the public knowledge and visibility of key public figures in Las Vegas and Reno, focusing on people germane to the lawsuit. We proceeded in two ways. First, we asked the residents of each venue if they could recall information about Tarkanian and the UNLV basketball program. Second, we asked respondents how much they have heard about a number of public figures in the Las Vegas and Reno areas – including key individuals involved in this lawsuit. Our first question asks if respondents know who coached the UNLV basketball team between 1973 and 1992.

QUESTION 3: Do you recall the name of the person who coached the University of Nevada – Las Vegas basketball team between 1973 and 1992 and won a NCAA national championship?

	Jerry Tarkanian	Other	Don't Know
Las Vegas	72%	00	28%
Reno	40	01	59

p.<.05

Almost twice as many people (1.8 to 1) in Las Vegas can recall Tarkanian's name than in Reno. To put these 72% who recall Tarkanian in perspective, a recent national poll showed 33% knew the name of their Congressional Representative, 55% can name one U.S. senator from their state and 24% could give the name of both senators from their state (*Washington Post Weekly*, February 5-11, 1996). Despite having left UNLV four years ago in 1992, Jerry Tarkanian is still very widely known in the Las Vegas area. However, his public visibility does not transfer to Reno, where only 40% could recall his name (a bit more than can typically recall their Congressman). Fifty-nine percent of the Reno sample cannot pass the recall test.

16. Next we asked if respondents could recall where Jerry Tarkanian is coaching now. It should be stressed people had to make a top-of-the-head recall. They were not presented with options which might jog their memories. Again, we see significantly more knowledge about Tarkanian's current whereabouts in the Las Vegas area than in Reno.

QUESTION 4: Do you know where former UNLV coach Jerry Tarkanian is coaching now?

	Fresno State	Other	Don't Know
Las Vegas	34%	15%	51%
Reno	22	08	71

p.<.05

17. Finally, we asked if respondents could recall what year UNLV won the national NCAA championship. Again, we see quite substantial differences between residents of Las Vegas and Reno. More than twice as many in

Las Vegas than Reno recall the year of UNLV's championship team. There are 24% more in Reno than Las Vegas who simply volunteer they don't know.

QUESTION 5: Do you recall in March of what year UNLV won the NCAA national basketball championship?

	1990	Other	Don't Know
Las Vegas	30%	20%	50%
Reno	12	14	74

p.<.05

18. In a somewhat different approach to public visibility, we asked respondents how much they had heard about a variety of public figures in the Las Vegas and Reno areas. We chose people in the private sector as well as elected officials. In the private sector we used Las Vegas casino owner Steve Wynn and Reno casino owner John Ascuaga. From UNLV we used Jerry Tarkanian, his successor Rolli Massamino, and former UNLV president Robert Maxson. From the NCAA we used David Berst. From the public sector we used Senator Richard Bryan and Governor Bob Miller. We see below, Jerry Tarkanian is the best known of the public figures we tested in Las Vegas, but far down the list in Reno. The percents below indicate how many people have heard "a lot" about the public figure.

QUESTION 6: How much have you heard about. . . . A lot, something, only a little or nothing at all?

Have Heard "a lot" about

Las Vegas		Reno		
Jerry Tarkanian	69%	Jerry Tarkanian	36%	*p.<.05*
Steve Wynn	66	John Ascuaga	61	*n.s.*
Bob Miller	50	Bob Miller	61	*p.<.05*

Richard Bryan	31	Richard Bryan	48	*p.<.05*
Robert Maxson	27	Robert Maxson	04	*p.<.05*
Rolli Massamino	26	Rolli Massamino	08	*p.<.05*
David Berst	02	David Berst	00	*p.<.05*

We see Tarkanian is the best known person in our list from the Las Vegas area, despite having left coaching at UNLV four years ago in 1992. He is considerable [sic] better known than his successor, Rolli Massamino, despite Massamino having coached UNLV more recently. Note also that Robert Maxson, former UNLV president who has been gone for three years, is only slightly less well known as Senator Richard Bryan, and about as well known as coach Massimino. Only NCAA investigator David Berst is mostly unknown. Note also how much better known the elected officials (Governor Miller and Senator Bryan) are in Reno than Las Vegas. But Jerry Tarkanian and Steve Wynn are better known than anyone on the list in Reno. It seems apparent that Las Vegas is a more insular, inward looking community than Reno.

19. Thus key players in this lawsuit – Jerry Tarkanian and Robert Maxson – are much less well known in Reno than they are in Las Vegas. Slightly less than twice as many people in Las Vegas say they know "a lot" about Jerry Tarkanian than they do in Reno. More than three times as many people in Las Vegas say they know "a lot" about Robert Maxson than they do in Reno.

20. For those respondents who said they knew "a lot," "something" or "a little" about each public figure, we then asked them to rate the public figure on a zero to ten scale, with zero being strong dislike, five being neutral and 10 being strong liking. The rank order of the means

of like-dislike items is presented below, from most liked to least liked.

Mean like-dislike on a Zero to Ten Scale

	Las Vegas	
Jerry Tarkanian	7.1(92%)*	
Bob Miller	6.5(84%)	
Steve Wynn	6.4(92%)	
Richard Byran [sic]	6.3(61%)	
David Berst	4.0(06%)	
Robert Maxson	3.5(59%)	
Rolli Massamino	3.4(60%)	
	Reno	
Jerry Tarkanian	5.4(76%)*	*p.<.05*
Bob Miller	6.6(89%)	*n.s.*
John Ascuaga	7.9(90%)	*p.<.05*
Richard Bryan	6.2(74%)	*n.s.*
David Berst	4.9(04%)	*n.s.*
Robert Maxson	3.7(19%)	*n.s.*
Rolli Massamino	4.7(28%)	*p.<.05*

**percent who rated each person*

Question 6 showed Jerry Tarkanian was the best known person in Las Vegas on our list. This battery of questions shows he is also the best liked person in Las Vegas among those on our list. We see he is significantly much better liked in Las Vegas than in Reno. However, Tarkanian is not *disliked* in Reno; his popularity rating falls above the midpoint. But he is a very popular person in Las Vegas. Sixty percent of the Las Vegas respondents rate Robert

Maxson, and give him very poor marks. They are not significantly different from his ratings in Reno, but many fewer people feel able to rate him in Reno – in fact only 19% feel capable or [sic] rating Robert Maxson. Jerry Tarkanian is much more popular in Las Vegas than his successor, Rolli Massamino. That is true in Reno as well, but not nearly to the extent in Las Vegas. Plus, many fewer respondents are able to rate either Tarkanian or Massamino in Reno when compared to Las Vegas.

21. Next, we used the same ten point scale and asked respondents from each venue to rate major league baseball, the NCAA, the NFL and the NBA. That data for each venue is presented below.

Mean Like-Dislike on a Zero-to-Ten Scale

	Las Vegas	Reno	
Major League Baseball	5.3(32%)*	4.4(41%)*	*p.<.05*
NCAA	5.5(24%)	5.8(18%)	*n.s.*
NBA	7.0(10%)	6.5(13%)	*p.<.05*
NFL	7.2(08%)	6.8(13%)	*p.<.05*

**percent negative ratings (zero through four)*

We see the NBA and NFL are the highest rated in both venues. They are basically doing their job with little controversy, and people tend to give them either neutral or positive marks. Major league baseball is still suffering fallout from the 1994 strike. It is rated lowest in both venues, but particularly low in Reno. But note that all three professional associations are rated higher in Las Vegas than in Reno, at levels that are statistically significant. Las Vegas seems to be more upbeat about pro-sports (or at least their associations) than is Reno. The one

exception is the NCAA. It is rated lower in Las Vegas than Reno, although the mean differences are not statistically significant.

22. Recording the like-dislike scale for the NCAA into negative (0 thru 4), neutral or unsure (5 plus those who are unsure), and positive (6 thru 10) yields a statistically significant difference, with a more negative rating in Las Vegas, a more neutral or unsure rating in Reno, and about the same number of positive ratings in both venues.

Rate the NCAA

	Negative	Neutral	Positive
Las Vegas	24%	34%	42%
Reno	17	39	43

p.<.05

But the differences here are not large. The likely reason is that, for some, the NCAA-Tarkanian link is not a top-of-the-head consideration when the opinion about the NCAA is being expressed in isolation from facts in the case. But when Tarkanian, UNLV and the NCAA are linked together, Las Vegas is much more pro-Tarkanian and hostile to the NCAA than is Reno.

23. We continue with six items that specifically address the dispute between the NCAA, UNLV and Jerry Tarkanian, and one which addresses only Tarkanian and UNLV. These are five-point agree/disagree statements. Respondents were told:

Next, I'd like to read a series of statements, and ask if you strongly agree with the statement, somewhat agree, somewhat disagree, or strongly disagree. You may also say you are unsure or have no opinion.

In some instances, taking a position favoring Mr. Tarkanian means to agree with the statement, and in some instances taking a position favoring Mr. Tarkanian means to disagree with the statement. The response which favors Mr. Tarkanian is highlighted in bold. The seven statements and their distributions are:

QUESTION 14. All schools break some NCAA rules, but UNLV coached by Tarkanian went to [sic] far and broke too many.

	Strongly Agree	Somewhat Agree	No Opinion Unsure	Somewhat Disagree	Strongly Disagree
Las Vegas	06%	18%	35%	***23%***	***19%***
Reno	08	25	41	***20***	***06***

p.<.05

QUESTION 16: The NCAA case against Tarkanian has nothing to do with vengeance on the part of the NCAA, but rather a good faith attempt to enforce the rules.

	Strongly Agree	Somewhat Agree	No Opinion Unsure	Somewhat Disagree	Strongly Disagree
Las Vegas	12%	18%	28%	***23%***	***20%***
Reno	14	29	33	***16***	***09***

p.<.05

QUESTION 19: The NCAA has unfairly harassed UNLV coaches and players.

	Strongly Agree	Some-what Agree	No Opinion Unsure	Some-what Disagree	Strongly Disagree
Las Vegas	20%	28%	33%	12%	07%
Reno	08	22	44	18	09

p.<.05

QUESTION 20: The NCAA actions against Tarkanian and UNLV have done great damage to the University's athletic program.

	Strongly Agree	Some-what Agree	No Opinion Unsure	Some-what Disagree	Strongly Disagree
Las Vegas	42%	24%	17%	12%	05%
Reno	22	29	29	16	05

p.<.05

QUESTION 21: The NCAA is out to get Jerry Tarkanian and drive him out of college coaching.

	Strongly Agree	Some-what Agree	No Opinion Unsure	Some-what Disagree	Strongly Disagree
Las Vegas	21%	29%	28%	15%	08%
Reno	09	22	37	21	12

p.<.05

QUESTION 18: Jerry Tarkanian was treated fairly by the administration at UNLV.

	Strongly Agree	Somewhat Agree	No Opinion Unsure	Somewhat Disagree	Strongly Disagree
Las Vegas	07%	13%	32%	***24%***	***25%***
Reno	07	21	52	***13***	***08***

p.<.05

We see the proportion who take positions favorable to Mr. Tarkanian and unfavorable to the NCAA is always larger in Las Vegas. This is particularly true when it comes to having a "strong" opinion on the matter. On every question there are at least twice as many respondents taking a strong pro-Tarkanian/hostile-NCAA position in Las Vegas then Reno. Pretrial publicity has led significantly more people in Las Vegas than Reno to believe *strongly* that Tarkanian *did not* break too many NCAA rules, that the NCAA case against Tarkanian *is not* a good faith attempt to enforce the rules. Significantly more people in Las Vegas than Reno are likely to believe that the NCAA has harassed UNLV players and coaches, that the NCAA actions have done "great" damage to the UNLV athletic program, that the NCAA is bent on driving Jerry Tarkanian out of college coaching, and finally that UNLV did not treat him fairly.

24. It is also important to note that Reno respondents who have an opinion on items that mention the NCAA often have approximately the same number of agree responses as disagree responses. In Reno, only one of the items (question 16) has a decided NCAA tilt, which is

compensated for by the decided Tarkanian tilt in question 20.

25. Based on the eight agree-disagree statements (Questions 14 through 21) I created an opinionation index. The opinionation index measures the extent to which there are differences in holding opinions between the venues. The eight questions are recorded so that "unsure" or "no opinion" equals zero and strong and somewhat agree or disagree equals one. I then added these eight items and counted the percent in each venue who had expressed opinions. The scale can range from 0 to 8, with zero meaning that on the 8 items not a single opinion was expressed and 8 meaning an opinion was expressed on all eight items. Below, for each venue, is the percent who expressed six or more opinions on the eight items, and the percent who expressed an opinion on all eight items.

	Las Vegas	Reno	
Express 6 or more opinions on eight items	69%	52%	*p.<.05*
Express 8 opinions on eight items	47%	23%	*p.<.05*

The data show opinionation is considerably higher in Las Vegas than in Reno. There are many more people who do not have an opinion on matters relevant to this lawsuit in Reno than is the case in Las Vegas. These data confirm what the individual items show throughout the entire survey. There are virtually no questions where opinionation is higher in Reno than Las Vegas. Taken in total, there are many fewer people with opinions on matters relevant to a fair trial in the Reno venue than in Las Vegas.

26. Next we shall look at responses to a series of questions about the importance of Jerry Tarkanian and his UNLV basketball program to residents of Las Vegas and Reno. We asked how important it was to the Las Vegas/ Reno area when UNLV won the national title in 1990, and how important it was personally to the respondent. We asked if respondents thought the Jerry Tarkanian years at UNLV were an asset or liability to the school, whether Jerry Tarkanian has been good for the state of Nevada, and finally, if respondents would like to see Jerry Tarkanian return to Las Vegas and coach the UNLV basketball team.

27. First we shall examine respondent's views about the importance of the 1990 NCAA title, and then its personal importance.

QUESTION 10: How important was it to the (Las Vegas/ Reno) area when UNLV won the national basketball title in 1990?

	Very important	Somewhat important	Only a little important	Not important at all	Don't Know
Las Vegas	76%	10%	04%	02%	09%
Reno	26	27	14	16	18

p.<.05

QUESTION 11: How important was winning the title to you personally?

	Very important	Somewhat important	Only a little important	Not important at all	Don't Know
Las Vegas	32%	18%	11%	33%	06%
Reno	10	16	13	55	06

p.<.05

Clearly, the 1990 season is viewed as being very important to the Las Vegas community by its citizens, but not of much importance to the Reno community in the minds of its citizens. In fact, slightly less than three times as many say it was very important to Las Vegas than say it was very important to Reno. We see the same pattern when asked how important it was personally to each respondent. Over three times as many people in Las Vegas as compared to Reno say it was very important to them personally. More telling is that almost 55% in Reno say UNLV's winning the NCAA title in 1990 was "not important at all" to them personally.

28. Next, we shall ask if Tarkanian was seen as an asset or a liability to UNLV and whether or not he was good for Nevada.

QUESTION 12. Overall, do you think the Jerry Tarkanian years at UNLV were an asset or a liability to the school.

	Asset	Unsure	Liability
Las Vegas	73%	17%	10%
Reno	56	27	17

p.<.05

QUESTION 17: Jerry Tarkanian has been good for the State of Nevada.

	Strongly Agree	Somewhat Agree	No Opinion Unsure	Somewhat Disagree	Strongly Disagree
Las Vegas	*45%*	*29%*	17%	05%	04%
Reno	*18*	*31*	32	10	09

p.<.05

29. In both Las Vegas and Reno substantial majorities think the Jerry Tarkanian years were an asset to UNLV, although the proportion in Las Vegas is significantly higher than in Reno. On the other hand, there is a much stronger feeling in Las Vegas that Tarkanian was good for Nevada. A majority in both venues take this position, but the residents of Las Vegas clearly feel a lot stronger about the good things Jerry Tarkanian did for Nevada while he coached the UNLV basketball team than do the residents of Reno.

30. Finally, we asked residents of both venues if they would like to see Jerry Tarkanian return to coach the UNLV basketball team.

QUESTION 13. Would you or would you not like to see Jerry Tarkanian return to coach the UNLV basketball team?

	Yes	Unsure	No	Don't Care
Las Vegas	56%	11%	19%	13%
Reno	34	17	24	25

p.<.05

Over half of Las Vegas residents would like to see Jerry Tarkanian return to coach the UNLV basketball team, considerably more than expressed that view in Reno. Also, combining "unsure" and "don't care" adds to 24% in Las Vegas while it adds to 42% in Reno.

31. We also told respondents that Jerry Tarkanian is suing the NCAA, and gave a brief description of the contentions made by each side. Respondents were then asked who they preferred to see win this lawsuit – Jerry Tarkanian or the NCAA – or did they have no opinion. Later in the questionnaire we asked respondents who they thought their family and friends would prefer to see win the lawsuit – Jerry Tarkanian or the NCAA, or are they unsure. The case scenario we used is presented below (**QUESTION 8**):

Next, I'd like to read you a brief summary of a lawsuit between Jerry Tarkanian and the NCAA. Jerry Tarkanian, former UNLV basketball coach, is suing the NCAA alleging a vendetta and conspiracy by the NCAA to ruin his reputation and drive him out of college coaching. Beginning in 1972, when Tarkanian was coach at Long Beach State, he began to speak out critically about how the NCAA ignored rules violations by big time college athletic programs, while vigorously enforcing those same rules in the case of smaller, less powerful colleges.

As a result of his continuing criticism, Tarkanian alleges that the NCAA has conspired to damage his reputation by wrongfully and unlawfully attacking him and the Universities which have employed him. Tarkanian alleges that the NCAA and its investigators created false evidence to support the charges leveled at Coach Tarkanian. Some of the allegations against Tarkanian were, in fact, dropped by the NCAA due to inconclusive evidence. Because of this alleged conspiracy and vendetta by the

NCAA to ruin his reputation, Tarkanian claims he has lost lucrative endorsement contracts, and has been denied other opportunities for professional advancement and financial reward. He also claims the NCAA harassed his players and caused potential recruits to his basketball program to go elsewhere. Due to the NCAA harassment and threatened sanctions against UNLV, Tarkanian alleges he was forced to resign his coaching job.

The NCAA denies these allegations by Jerry Tarkanian. The Association claims it found serious violations in Tarkanian's Long Beach State basketball program when he coached there from 1968 to 1972. The NCAA alleges that it was only after it started looking into these violations that Tarkanian began criticizing the NCAA. In 1973, after a lengthy investigation, the NCAA found Long Beach State and Tarkanian's basketball program guilty of serious violations, and imposed severe penalties on the school, including no TV, no post-season tournament and loss of scholarships. While the Long Beach State investigation was going on, the NCAA launched an investigation of the UNLV program and alleged there were serious rules violations. In 1977, the UNLV team was banned from TV and post-season play for two years, and UNLV was told to ban Tarkanian from coaching for two years. Tarkanian's suspension was delayed by Court action. Ultimately the NCAA and UNLV agreed that UNLV could defend its national championship in 1991, but had to sit out the tournament in 1992. The NCAA claims many schools have been punished for violating NCAA rules and procedures, and that UNLV was treated fairly. Finally, the NCAA alleges that Tarkanian's decision to resign as coach at UNLV was the result of factors unrelated to the NCAA investigation of the UNLV basketball program.

Who would you prefer to see win this case – Jerry Tarkanian, the NCAA, or do you have no opinion?

	Tarkanian	Unsure No Opinion	NCAA
Las Vegas	52%	33%	15%
Reno	30	48	22

p.<.05

QUESTION 23: If the case were tried in (Las Vegas/ Reno), do you think most of your family and friends would prefer to see Jerry Tarkanian win, would they prefer to see the NCAA win, or are you unsure?

	Tarkanian	Unsure	NCAA
Las Vegas	58%	33%	09%
Reno	26	60	14

p.<.05

In both the Las Vegas and Reno venues Tarkanian has a preference advantage. But that advantage is very large in Las Vegas, where an absolute majority prefer to see him win the lawsuit. Las Vegas respondents report that over 58% of their family and friends would prefer to see Tarkanian win the lawsuit, more than twice the number in Reno. We also see for the case scenario that almost half the Reno respondents have no opinion, and 60% are unsure how family and friends feel about the case.

32. Finally, we shall examine the respondents attentiveness to media coverage of the dispute between Jerry Tarkanian, UNLV and the NCAA.

QUESTION 22: Did you follow media coverage of the dispute between Jerry Tarkanian, the administration at UNLV, and the NCAA which, Tarkanian alleges, forced

him to resign his coaching job? [IF YES] Did you follow it closely or not very closely?

	Followed closely	Followed, but not closely	Did not follow
Las Vegas	29%	47%	25%
Reno	14	42	44

p.<.05

We see there was about twice as much close media attention to the dispute in Las Vegas compared to Reno. Forty-four percent of the Reno adult population did not follow the dispute at all, compared to a quarter in Las Vegas.

33. The survey data tell a clear and consistent story. We start with the fact that Las Vegas and Reno differ in a way that is central to this case. Residents of Las Vegas and Clark county are more interested in college basketball than residents of Reno and Washoe county. On the other hand, residents of Reno and Washoe county are more interested in college football than residents of the Las Vegas area. While Las Vegas and Clark county can be characterized as attuned to college basketball, the Reno area is better characterized as being attuned to college football. These facts argue for a venue change to Reno.

34. In defending itself against the lawsuit brought by Jerry and Lois Tarkanian, the NCAA cannot get a fair trial in Clark county, Nevada. The pretrial publicity greatly biases the Clark county population in favor of Jerry Tarkanian. Beyond general predispositions discussed above, the survey shows about twice as many people in Las Vegas than Reno paid close attention to media coverage of the dispute between Tarkanian, UNLV and the NCAA. Jerry Tarkanian is arguably the best known and best liked

public figure in Clark county. A majority in Clark county thought the UNLV 1990 championship was "very important" to Las Vegas. A majority in Clark county thought the Tarkanian years at UNLV were an asset to the school. And a majority in Clark county want Jerry Tarkanian back in Las Vegas coaching the UNLV basketball team. The distribution on these same questions in the Reno area are much more symmetrical with a larger number indicating "no opinion."

35. The eight agree-disagree questions showed a very decided bias toward Tarkanian and against the NCAA in Clark county. For example, 50% of Clark county residents agreed that "the NCAA is out to get Jerry Tarkanian and drive him out of college coaching." Only 31% agreed with that statement in Reno, and 33% disagreed – a more or less even distribution of opinion. Our eight-item measure of opinionation show significantly more opinions about this dispute have been formed by the residents of Clark county compared to Washoe county.

36. Finally, a majority of the residents of Clark county want Jerry Tarkanian to defeat the NCAA in the lawsuit he has filed. In addition, Clark county respondents indicate that a majority of their family and friends want Jerry Tarkanian to defeat the NCAA in court. There is no such majority in Washoe county. Tarkanian still has an advantage on these questions in Washoe county, but the distribution is more symmetrical with more people saying "no opinion" or "unsure".

37. The general distribution of opinion in Washoe county on issues relevant to *Tarkanian v. NCAA* still remains slightly favorable to Tarkanian and unfavorable

to the NCAA. But it is a much fairer venue than Clark county. It is my opinion, and the opinion of my collaborator Richard Murray, that the NCAA cannot get a fair trial [sic] Clark county. It is our opinion that the odds of a fair trial, free from the adverse effects of pretrial publicity, are much greater in Washoe county.

STATE OF TEXAS)
)
COUNTY OF HARRIS)

SWORN TO SUBSCRIBED before me this 7th day of March 1996, by Kent L. Tedin

(SEAL)

/s/ Andrew Bishara
Notary Public
ANDREW BISHARA

Notary Public, State of Texas
My Commission Expires
AUGUST 19, 1997

APPENDIX H

IN THE DISTRICT COURT OF CLARK COUNTY NEVADA

JERRY AND LOIS TARKANIAN,	)	March 18, 1996
Plaintiffs,	)	
	)	No. A314006
v.	)	DEPT. NO. 10
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET. AL.	)	DOCKET NO. K
Defendants.	)	

AFFIDAVIT OF STEVEN PENROD

EXPERTISE

a. I have conducted research on the effects of pretrial publicity on jury decisionmaking – e.g., Otto, Penrod, and Dexter (1994); Otto, and Penrod (1991); Penrod (1991); Penrod and Otto (1992); Penrod and Otto (1992); on the effects of media coverage of trials – e.g., Borgida, Penrod, Manteufel, Lengnick, Otto, and Regan, P. (1992); Manteufel, Smith, Penrod, and Borgida (1994); Penrod, Borgida, and Heuer (1992); written a review of pretrial publicity research (e.g. Linz and Penrod, 1992), and have written about the research in other contexts – e.g.. in my *Social Psychology* textbook and articles for practicing lawyers – Penrod et al., (1984); Penrod and Cutler, (1987).

b. I regularly teach about pretrial publicity research and effects in courses such as psychology and law and social science and law.

c. I have supervised undergraduate and graduate research on pretrial publicity effects.

d. I have been a principal investigator on two research grants from the Law and Social Sciences program of the National Science Foundation which address problems of the media and courtroom decisionmaking.

e. Though not evident from my curriculum vita, I have been qualified as an expert witness on pretrial publicity effects and most recently testified about the relevant research in the Oklahoma bombing case.

Overview

I this affidavit I:

1. Report the methods and results of a content analysis of the coverage of the NCAA/Tarkanian relationship in the Las Vegas Review Journal and the Reno Gazette Journal between the years 1986 and 1992.

2. Briefly summarize the results of the public opinion survey of residents of Las Vegas and Reno undertaken and reported by Professor Kent Tedin, and place the content analysis and public opinion results in the context of other published surveys that address the relationship between media exposure and pretrial judgment.

3. Review research demonstrating that pretrial judgments influence juror verdicts.

4. Review research demonstrating that traditional safeguards against the biasing effects of pretrial publicity (continuances, extensive voir dire, deliberation, and judicial admonitions) are ineffective, whereas changes of

venue to locations with less media exposure and prejudgment provide effective safeguards against biases induced by pretrial publicity.

The Content Analysis

Method

Newspaper coverage of Jerry Tarkanian (Tarkanian) and the National Collegiate Athletic Association (NCAA) in the *Las Vegas Review-Journal* and the *Reno Gazette-Journal* was content analyzed for positive and negative references to each party. Special attention was also paid to positive and negative references to the University of Nevada-Las Vegas (UNLV) basketball program, and to the conduct of its staff, its current and former players, and its recruits. The sampling frame spanned the course of seven years (1986-1992), and was designed to ensure that the final sample of articles would represent a random sample of articles published in each paper.

Sampling

Articles were identified for content analysis using a multi-phase selection strategy. A random sample of half the days from the 84 months within the sampling frame was selected All articles (other than simple reports of scores) appearing on those 15 days in each paper that mentioned UNLV basketball, Tarkanian, or the NCAA were manually retrieved and copied by research assistants at UNLV from microfiche archives.

Article Position

The horizontal and vertical positioning of the article on the page was recorded. The horizontal position was recorded as "top half", "bottom half" or "middle" if it appeared at the fold. The vertical position of an article was recorded as "first, second, third, or fourth" depending on where the top left corner of the article appeared from left to right on the page.

Article Length

The length of the article was calculated as the total number of paragraphs on the first page plus the number of paragraphs on continuing pages.

Picture Content

Pictures of Mr. Tarkanian appearing in conjunction with articles were counted and coded.

Text Content

The content of text was coded to reflect the nature of the statement and the source making the assertion. A total of 21 types of statements and 11 sources were coded. The number of times each type of statement appeared was tallied. Each article could have a number of statements of each type. However, no statements were coded in more than one category. A statement was defined as an assertion or concept, and could be represented by a fraction of a sentence, a full sentence, or multiple sentences.

Nature of Statements

The nature of the statements clustered along several dimensions including fairness, targeting Tarkanian or UNLV basketball, rule violations, player misconduct, Tarkanian traits, prejudgments regarding this law suit, and other.

Fairness. Statements coded on this dimension included the conduct of the NCAA, Tarkanian, UNLV players, NCAA staff, and investigative bodies such as UNLV administration. The number of times each parties' behavior/treatment of Tarkanian, UNLV, or players was described as "Fair", "Not Fair", or "Neutral" was recorded. For example, the number of times NCAA procedures, policies, and regulations were described as "Fair," "Not Fair," or mentioned in a neutral manner was tallied, as were the number of times the NCAA investigation of Tarkanian and/or UNLV was described as "Fair," "Not Fair," or was neutrally mentioned. Other items on this "fairness" continuum included NCAA penalties, NCAA staff,[1] and UNLV's in-house investigation of the basketball program.

Targeting Tarkanian or UNLV Basketball. Statements coded on this dimension included suggestions that the NCAA or the administration at UNLV was "out to get," or conversely, "not out to get," Tarkanian or the UNLV basketball program. This dimension also included statements suggesting that the NCAA was "harassing" or, conversely, "not harassing" Tarkanian or the UNLV basketball program. This dimension reflected statements

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[1] Neutral mentions of NCAA staff were not coded.

suggesting that the NCAA was "biased" or "not biased" against Tarkanian or the UNLV basketball program. Finally, statements suggesting the NCAA fabricated evidence against Tarkanian or the UNLV basketball program, and statements by the Nevada court suggesting that the NCAA has been unfair in its treatment of Tarkanian or the UNLV basketball program were tallied.

Rule Violations. Statements coded on this dimension included suggestions that Tarkanian or the UNLV basketball program violates or, conversely, does not violate the rules and policies of the NCAA or of UNLV.

Player Misconduct. Statements suggesting that current, past, or future UNLV players' conduct was or was not a problem were tallied as were neutral statements regarding current, past, or future UNLV players. Statements discussing an incident in which UNLV players were seen in a hot-tub with a known point-shaver were tallied.

Tarkanian Traits. Statements coded on this dimension included good and bad qualities of Tarkanian, that Tarkanian is good or bad, for UNLV, Nevada, or Las Vegas.

Prejudgments Regarding Suit. Statements suggesting the source of the statement favored Tarkanian or, conversely, the NCAA in this dispute were tallied.

Other. Neutral statements in which the NCAA was mentioned with Tarkanian were tallied.

Sources

Statements were attributed to sources including the NCAA, Mr. Tarkanian, Lois Tarkanian, Danny Tarkanian, UNLV officials and administrators, UNLV basketball program staff and coaches, non-UNLV coaches, government officials, the article's author, the editor or editorial writer, and the general public. (Danny and Lois Tarkanian were credited with very few statements – consequently, these two categories were ignored in the analysis).

Training

Three teams of undergraduate and graduate student research assistants were trained to code articles by a post-doctoral fellow at the University of Nebraska, Lincoln. One research team was based in Lincoln, Nebraska, a second was based in Lawrence, Kansas and the third was based at Las Vegas (this team was also responsible for photocopying articles and keypunching data).

Each training session ran roughly 2½ hours and covered the basic principles of research methodology, inter-rater reliability, and detailed the procedure for coding. Each coding category was discussed in detail using examples to illustrate category definitions. The training of the Kansas team, and the Las Vegas team was conducted by phone. A few articles were used in all three training sessions to acquaint coders with the task and illustrate coding categories.

Results of Content Analysis

Description of the Articles

Articles and Statements.

A total of 1228 articles were identified for coding (81% were from Las Vegas and 19% from Reno – a four to one ratio). These articles yielded 5785 codable statements (83% from Las Vegas and 17% from Reno). It is important to remember that these articles represent only one-half of the articles that were likely printed during the seven year period of study. (Due to occasional missing data, totals reported below are sometimes lower than these figures).

Year of Publication.

1986 and 1988 supplied the smallest number of articles and 1990 the largest. Publication rates in the two papers differed slightly: The Las Vegas Review Journal yielded proportionately more articles in 1987 and fewer in 1991. These differences probably reflect variations in editorial practices.

Year	1986	1987	1988	1989	1990	1991	1992	Total
Articles	101	169	101	104	336	217	200	1228
Percent	8%	14%	8%	9%	27%	18%	16%	100%

Month of publication.

Although more articles were published in the winter and spring (during the basketball season), the two papers did not differ significantly in their rates of monthly publication.

Placement.

As the following table indicates, the coded articles in the Las Vegas paper were, in comparison to the Reno paper, more likely to appear on the front page and other sections and less likely to appear in the sports section. This pattern indicates that the appeal of stories about the parties and events was broader for Las Vegas readers than for the Reno readers.

	L.V. Review Journal	Reno Gazette Journal	Total
front section	82 8%	11 5%	93 8%
sports section	787 79%	208 90%	995 81%
other sctns	125 13%	11 5%	136 11%
Column Total %	994 81%	230 19%	1224 100.0%

Overall, 54% of articles appeared on the front page – the two newspapers did not differ significantly in their placement of articles across pages. Overall, 53% of articles appeared on the top half of the paper and 47% appeared in the left-most quarter of the paper – again, the papers did not differ in their placement of articles. The average length of Las Vegas articles was 19.1 paragraphs versus 12.9 paragraphs for Reno.

Pictures.

The Las Vegas articles contained 120 pictures of Mr. Tarkanian compared to 43 in Reno.

Coverage

In the next few pages the coverage of Jerry Tarkanian, UNLV basketball, and the NCAA investigation by the Las Vegas Review Journal and the Reno Gazette Journal over the period of 1986 to 1992 is summarized in terms of:

1. the total number of statements made about particular topics in the two newspapers (multiple statements – including multiple statements about a particular topic – can appear in a single article);

2. the average number of statements appearing in each article; and

3. the number of articles relating to these topics published in the two papers (Las Vegas Review Journal = 996 articles and Reno Gazette Journal = 231 articles).

It should be noted that the sheer volume of articles published in the Las Vegas Review Journal exceeds the number in the Reno Gazette Journal by a ratio of four to one and the number of statements contained in those articles appear at a ratio of five to one (it is likely that the ratio for statements is larger than the ratio for articles because the average length of Las Vegas articles was 19.1 paragraphs versus 12.9 paragraphs for Reno). Readers in Las Vegas are clearly exposed to a much greater volume

of coverage about Jerry Tarkanian, UNLV basketball, and the NCAA investigation.

Furthermore, within individual topic areas the ratio of statements is sometimes (much) higher than the usual five to one ratio. In the table below, significant differences in the ratios (at the p. ‹ .05 level) between papers are noted by an asterisk. In particular, readers of the Las Vegas Review Journal are much more likely to be exposed to statements indicating: the NCAA is harassing Tarkanian or UNLV, Tarkanian violates rules, Tarkanian is good for city/state/university, Tarkanian is not good for city/state/university, UNLV is harassing Tarkanian or program, UNLV is not harassing Tarkanian or program, UNLV investigation is fair, UNLV basketball violates rules, favor NCAA in lawsuit, and other investigations of Tarkanian or program.

And, once again, the numbers reported here and below represent only a 50% sample of the full coverage. The best estimate of the number of articles and statements published during the seven year period of study is likely to be twice as large as the numbers reported here.

Nature of Statement	Total N of Statements	Ave N per Article	Total Articles
TOTAL NUMBER OF STATEMENTS			
Review Journal	4832.00	4.8514	996
Reno Gazette Journal	949.00	4.1082	231
Total	5781.00	4.7115	1227

PLAYER MISCONDUCT IS A PROBLEM			
Las Vegas Review Journal	317.00	.3183	996
Reno Gazette Journal	84.00	.3636	231
Total	401.00	.3268	1227
PLAYER MISCONDUCT IS NOT A PROBLEM			
Las Vegas Review Journal	114.00	.1145	996
Reno Gazette Journal	25.00	.1082	231
Total	139.00	.1133	1227
PLAYER MISCONDUCT MENTIONED NEUTRALLY			
Las Vegas Review Journal	202.00	.2028	996
Reno Gazette Journal	28.00	.1212	231
Total	230.00	.1874	1227
NCAA PROCEDURES ARE FAIR			
Las Vegas Review Journal	128.00	.1285	996
Reno Gazette Journal	29.00	.1255	231
Total	157.00	.1280	1227
NCAA PROCEDURES ARE NOT FAIR			
Las Vegas Review Journal	223.00	.2239	996
Reno Gazette Journal	78.00	.3377	231
Total	301.00	.2453	1227

NCAA PROCEDURES ARE NEUTRAL			
Las Vegas Review Journal	480.00	.4819	996
Reno Gazette Journal	136.00	.5887	231
Total	616.00	.5020	1227
NCAA PENALTIES ARE FAIR			
Las Vegas Review Journal	58.00	.0582	996
Reno Gazette Journal	12.00	.0519	231
Total	70.00	.0570	1227
NCAA PENALTIES ARE NOT FAIR			
Las Vegas Review Journal	181.00	.1817	996
Reno Gazette Journal	39.00	.1688	231
Total	220.00	.1793	1227
NCAA PENALTIES MENTIONED NEUTRALLY			
Las Vegas Review Journal	371.00	.3725	996
Reno Gazette Journal	95.00	.4113	231
Total	466.00	.3798	1227
NCAA IS HARASSING TARKANIAN OR UNLV*			
Las Vegas Review Journal	35.00	.0351	996
Reno Gazette Journal	1.00	.0043	231
Total	36.00	.0293	1227

NCAA IS NOT HARASSING TARKANIAN OR UNLV			
Las Vegas Review Journal	16.00	.0161	996
Reno Gazette Journal	.00	.0000	231
Total	16.00	.0130	1227
NCAA INVESTIGATION IS FAIR			
Las Vegas Review Journal	22.00	.0221	996
Reno Gazette Journal	1.00	.0043	231
Total	23.00	.0187	1227
NCAA INVESTIGATION IS NOT FAIR			
Las Vegas Review Journal	106.00	.1064	996
Reno Gazette Journal	24.00	.1039	231
Total	130.00	.1059	1227
NCAA INVESTIGATION MENTIONED NEUTRALLY			
Las Vegas Review Journal	270.00	.2710	996
Reno Gazette Journal	56.00	.2424	231
Total	326.00	.2657	1227
NCAA STAFF IS FAIR			
Las Vegas Review Journal	1.00	.0010	996
Reno Gazette Journal	1.00	.0043	231
Total	2.00	.0016	1227

NCAA STAFF IS NOT FAIR			
Las Vegas Review Journal	10.00	.0100	996
Reno Gazette Journal	7.00	.0303	231
Total	17.00	.0139	1227
NCAA IS BIASED			
Las Vegas Review Journal	44.00	.0442	996
Reno Gazette Journal	6.00	.0260	231
Total	50.00	.0407	1227
NCAA IS NOT BIASED			
Las Vegas Review Journal	5.00	.0050	996
Reno Gazette Journal	1.00	.0043	231
Total	6.00	.0049	1227
TARKANIAN AND NCAA MENTIONED NEUTRALLY			
Las Vegas Review Journal	243.00	.2440	996
Reno Gazette Journal	52.00	.2251	231
Total	295.00	.2404	1227
TARKANIAN VIOLATES RULES*			
Las Vegas Review Journal	79.00	.0793	996
Reno Gazette Journal	3.00	.0130	231
Total	82.00	.0668	1227

TARKANIAN DOES NOT VIOLATE RULES			
Las Vegas Review Journal	50.00	.0502	996
Reno Gazette Journal	13.00	.0563	231
Total	63.00	.0513	1227
TARKANIAN IS GOOD FOR CITY/STATE/UNIVERSITY*			
Las Vegas Review Journal	112.00	.1124	996
Reno Gazette Journal	6.00	.0260	231
Total	118.00	.0962	1227
TARKANIAN IS NOT GOOD FOR CITY/STATE/UNIVERSITY*			
Las Vegas Review Journal	40.00	.0402	996
Reno Gazette Journal	2.00	.0087	231
Total	42.00	.0342	1227
UNLV IS HARASSING TARKANIAN OR PROGRAM*			
Las Vegas Review Journal	104.00	.1044	996
Reno Gazette Journal	10.00	.0433	231
Total	114.00	.0929	1227
UNLV IS NOT HARASSING TARKANIAN OR PROGRAM*			
Las Vegas Review Journal	27.00	.0271	996
Reno Gazette Journal	1.00	.0043	231
Total	28.00	.0228	1227

UNLV INVESTIGATION IS FAIR*			
Las Vegas Review Journal	**49.00**	**.0492**	**996**
Reno Gazette Journal	**2.00**	**.0087**	**231**
Total	**51.00**	**.0416**	**1227**
UNLV INVESTIGATION IS NOT FAIR			
Las Vegas Review Journal	**78.00**	**.0783**	**996**
Reno Gazette Journal	**11.00**	**.0476**	**231**
Total	**89.00**	**.0725**	**1227**
UNLV INVESTIGATION MENTIONED NEUTRALLY			
Las Vegas Review Journal	**93.00**	**.0934**	**996**
Reno Gazette Journal	**14.00**	**.0606**	**231**
Total	**107.00**	**.0872**	**1227**
UNLV BASKETBALL VIOLATES RULES*			
Las Vegas Review Journal	**187.00**	**.1878**	**996**
Reno Gazette Journal	**21.00**	**.0909**	**231**
Total	**208.00**	**.1695**	**1227**
UNLV BASKETBALL DOES NOT VIOLATE RULES			
Las Vegas Review Journal	**115.00**	**.1155**	**996**
Reno Gazette Journal	**17.00**	**.0736**	**231**
Total	**132.00**	**.1076**	**1227**

UNLV OUT TO GET TARKANIAN OR PROGRAM			
Las Vegas Review Journal	84.00	.0843	996
Reno Gazette Journal	16.00	.0693	231
Total	100.00	.0815	1227
UNLV NOT OUT TO GET TARKANIAN OR PROGRAM			
Las Vegas Review Journal	39.00	.0392	996
Reno Gazette Journal	8.00	.0346	231
Total	47.00	.0383	1227
FAVOR TARKANIAN IN LAWSUIT			
Las Vegas Review Journal	61.00	.0612	996
Reno Gazette Journal	8.00	.0346	231
Total	69.00	.0562	1227
FAVOR NCAA IN LAWSUIT*			
Las Vegas Review Journal	41.00	.0412	996
Reno Gazette Journal	3.00	.0130	231
Total	44.00	.0359	1227
TARKANIAN'S GOOD QUALITIES			
Las Vegas Review Journal	420.00	.4217	996
Reno Gazette Journal	77.00	.3333	231
Total	497.00	.4051	1227

TARKANIAN'S BAD QUALITIES			
Las Vegas Review Journal	132.00	.1325	996
Reno Gazette Journal	18.00	.0779	231
Total	150.00	.1222	1227
HOT-TUB INCIDENT MENTIONED			
Las Vegas Review Journal	89.00	.0894	996
Reno Gazette Journal	19.00	.0823	231
Total	108.00	.0880	1227
OTHER INVESTIGATION OF TARKANIAN OR PROGRAM MENTIONED*			
Las Vegas Review Journal	178.00	.1787	996
Reno Gazette Journal	16.00	.0693	231
Total	194.00	.1581	1227
NEVADA COURT SAYS NCAA NOT FAIR			
Las Vegas Review Journal	26.00	.0261	996
Reno Gazette Journal	9.00	.0390	231
Total	35.00	.0285	1227

Sources of Statements

This section presents an analysis of the sources of information and opinions reported in the two newspapers. The only difference in sources (as a proportion of codable statements) is that opinion/editorial statements were far more likely to appear in the Las Vegas newspaper (an average of .54 per article) as compared to the Reno paper (an average of .17 per article).

Nature of Statement	Total N of Statements	Ave N per Article	Total Articles
NCAA IS SOURCE OF STATEMENT			
Las Vegas Review Journal	280.00	.2872	975
Reno Gazette Journal	63.00	.2727	231
Total	343.00	.2844	1206
TARKANIAN IS SOURCE OF STATEMENT			
Las Vegas Review Journal	353.00	.3544	996
Reno Gazette Journal	89.00	.3853	231
Total	442.00	.3602	1227
UNLV IS SOURCE OF STATEMENT			
Las Vegas Review Journal	389.00	.3910	995
Reno Gazette Journal	73.00	.3174	230
Total	462.00	.3771	1225
AUTHOR OF ARTICLE IS SOURCE OF STATEMENT			
Las Vegas Review Journal	2095.00	2.1034	996
Reno Gazette Journal	441.00	1.9091	231
Total	2536.00	2.0668	1227
EDITOR IS SOURCE OF STATEMENT			
Las Vegas Review Journal	535.00	.5377	995
Reno Gazette Journal	39.00	.1688	231
Total	574.00	.4682	1226

GOVERNMENT OFFICIAL IS SOURCE OF STATEMENT			
Las Vegas Review Journal	**182.00**	**.1829**	**995**
Reno Gazette Journal	**41.00**	**.1775**	**231**
Total	**223.00**	**.1819**	**1226**
BASKETBALL OFFICIALS OR PLAYERS ARE SOURCE OF STATEMENT			
Las Vegas Review Journal	**230.00**	**.2312**	**995**
Reno Gazette Journal	**26.00**	**.1126**	**231**
Total	**256.00**	**.2088**	**1226**
A NON-UNLV COACH IS SOURCE OF STATEMENT			
Las Vegas Review Journal	**198.00**	**.1990**	**995**
Reno Gazette Journal	**25.00**	**.1082**	**231**
Total	**223.00**	**.1819**	**1226**
OTHER PEOPLE ARE SOURCE OF STATEMENT			
Las Vegas Review Journal	**536.00**	**.5414**	**990**
Reno Gazette Journal	**134.00**	**.5801**	**231**
Total	**670.00**	**.5487**	**1221**

Nature of Statements by Sources

This section presents a table displaying the number of statements attributed to each source and briefly discusses differences in the numbers of statements made by the parties and other sources.

These data permit a comparison of the statements attributed to the parties in this case. In particular it is evident that Mr. Tarkanian's public statements have taken

a much more adversarial tone than those of the NCAA. Mr. Tarkanian was the source of 130 statements that characterized the NCAA, its staff, its procedures, its investigation, its penalties and its motives in disparaging terms. As shown in the table, in comparison to the NCAA (column 1), Mr. Tarkanian (column 2) was credited with a dramatically disproportionate number of statements indicating that player misconduct was not a problem, or was mentioned neutrally; that NCAA procedures, penalties, staff, and investigation were not fair; that the NCAA is biased; that neither Tarkanian nor the UNLV basketball program violates rules; that Tarkanian is good for the city, state, or university; and, that UNLV was "out to get" the basketball program. In contrast, the NCAA was the source of 13 statements to the effect that player misconduct was a problem and 10 statements that UNLV basketball violated rules, but only 22 statements directly asserting that Mr. Tarkanian violated rules. The vast bulk of the NCAA statements appear to have been directed to explaining and defending its procedures, investigations, and penalties. In total, the NCAA and Tarkanian were credited with roughly 6 percent and 8 percent, respectively, of the almost 5700 statements coded.

Although not shown in the table, the only notable differences between the Las Vegas and Reno newspapers (in terms of proportion of statements attributed to each source) were that: 1). the proportion of editorial/opinion page statements appearing in the Las Vegas paper far exceeded the proportion appearing in the Reno paper – the raw numbers were 535 versus 39, and 2). the proportion of statements attributed to basketball program

sources was higher in Las Vegas than in Reno (the raw numbers were 230 and 26 respectively).

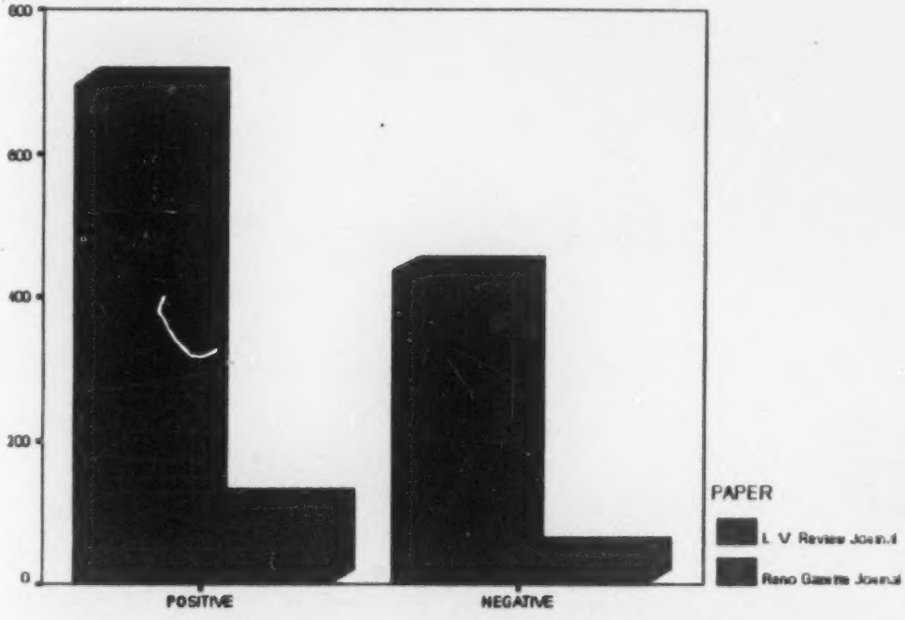
The direction in which the articles were slanted (towards Tarkanian or towards NCAA) sometimes varied across the type of statement and the source in Las Vegas versus Reno. In contrast to the usual 5:1 ratio of articles in the Las Vegas paper versus the Reno paper, the Las Vegas paper was much more likely than the Reno paper to print statements in which the NCAA (60:3) and/or editors (39:1) mentioned its penalties in a neutral manner. The Las Vegas paper was also far more likely to print: 1). statements in which the author indicated Tarkanian was good for the city, state, or university (40:0); 2). an editorial/opinion that discussed good qualities of Tarkanian (66:1) or bad qualities of Tarkanian (53:0); and 3). stories in which "other" sources indicated UNLV was harassing Tarkanian (28:0) or 4). that the UNLV basketball program violates rules (28:1).

In short, the Las Vegas paper appears to have devoted more space to Mr. Tarkanian's personal qualities and situation. Indeed, as Figures 1 and 2 (which sum the positive and negative statements made about the NCAA and Mr. Tarkanian) demonstrate, the balance of coverage in both Las Vegas and in Reno is more favorable to Mr. Tarkanian than to the NCAA, but this imbalance is more pronounced in Las Vegas than in Reno. As the figures show, the number of negative statements about the NCAA in Las Vegas (625 statements) is vastly larger than the number of negative statements about Mr. Tarkanian (164 statements), and the number of positive Las Vegas statements about Mr. Tarkanian (697 statements) greatly outnumbers the positive statements about the NCAA (438

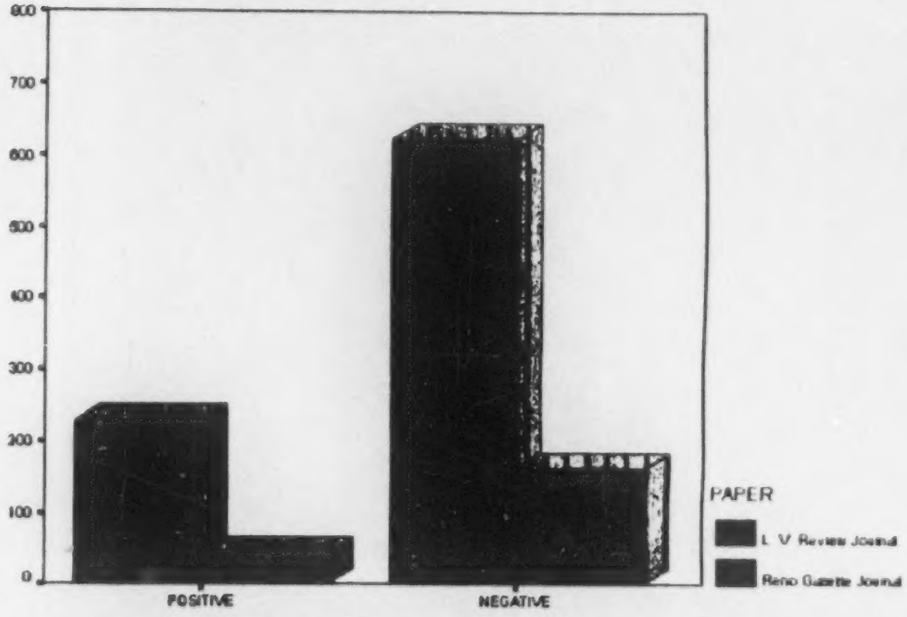
statements). The disparities in numbers of statements in Reno are much smaller.

The overall picture that emerges from these data is that the editorial practices and content of articles appearing in the Las Vegas and Reno newspapers are roughly comparable. A somewhat higher proportion of the articles in Law [sic] Vegas appeared on the op/ed pages and the Las Vegas newspaper appears, on the basis a few statement categories, to give greater emphasis to certain aspects of the NCAA-Tarkanian story (e.g., Mr. Tarkanian's personal qualities – both good and bad – constitute a higher percentage of the coded statements in Las Vegas as compared to Reno. However, there are profound differences in the importance of the story in Las Vegas versus Reno as reflected in the fact that four times as many articles and five times as many statements appeared in Las Vegas than in Reno.

POSITIVE AND NEGATIVE STATEMENTS ABOUT TARKANIAN
IN LAS VEGAS VERSUS RENO



POSITIVE AND NEGATIVE STATEMENTS ABOUT NCAA
IN LAS VEGAS VERSUS RENO



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Number of Statements by Source									Total	Statement Content
NCAA	Tark	U	Aut	Ed	Gov	UBB	Och	Othr*		
2	25	27	22	6	1	31	2	23	139	player misconduct not a problem
13	15	31	246	27	6	12	8	43	401	player misconduct a problem
5	28	16	134	15		13	3	14	230	player misconduct neutral
43	9	11	31	9	18	4	9	23	157	ncaa procedures fair
5	34	10	70	37	39	9	46	51	301	ncaa procedures not fair
92	7	18	379	63	12	8	7	30	616	ncaa procedures neutral
18	1	4	12	13	5	2	3	12	70	ncaa penalties fair
4	32	32	39	25	3	16	13	53	220	ncaa penalties not fair
63	6	29	291	40	5	19	4	7	467	ncaa penalties neutral
	9		13	5		4	2	3	36	ncaa harassing tark
1	1	3					1	10	16	ncaa not harassing tark
15			3	1	3	1			23	ncaa investigation fair
2	37	4	19	4	9	14	4	36	131	ncaa investigation not fair
26	6	49	176	20	13	13	2	20	326	ncaa investigation neutral
			2						2	ncaa fabricated evidence
1			1						2	ncaa staff fair
	5		6	2	4				17	ncaa staff not fair
1	13		9	10	1	3	1	11	50	ncaa biased
1	2	2						1	6	ncaa not biased
13	10	10	200	18	13	1	4	25	297	ncaa mention with tark
22	1	5	25	16	1		2	10	82	tark violates rules
	23	8	13	2	1	3	4	8	63	tark does not violate rules
	7	7	40	19	1	10	6	26	118	tark good for
		4	20	11	1			6	42	tark not good for
	25	9	24	19		5	2	28	114	unlv harass tark
		14		1			4	6	28	unlv not harass tark
	8	16	12	1	3	1	2	8	51	unlv invest fair
1	18	7	17	8	5	12	1	18	89	unlv invest not fair
3	9	29	41	1	2	5	6	10	107	unlv invest neutral
10	3	10	127	16	2	4	7	29	208	unlv ball vio rules
	37	17	25	5	4	19	1	21	132	unlv ball not vio rules
	15	6	31	9		14	4	19	100	unlv otg ball
	3	15	25	1			3		47	unlv not otg ball
1	2	7	10	5	17	3	3	19	69	favor tark in dispute
		2	5	4	27	1	2	3	44	favor ncaa in dispute
3	25	16	240	67	3	23	62	57	497	tark good qualities
	13	9	58	53		6	5	5	150	tark bad qualities
1	6	7	66	15	4			9	108	hot tub mention
2	5	40	88	23	10		1	25	194	other investigations
	3		18	3	10			1	35	nv court says ncaa unfair
343	443	462	2536	574	223	256	223	670	5699	

*NCAA=Association, Tark=Mr. Tarkanian, U=UNLV administrators or faculty, Aut=Author of article, Ed=opinion/editorial page, Gov=governmental official, UBB=UNLV basketball coaches and players, Och=other coaches, Othr=other sources

Note: totals for "NCAA investigation not fair" and "NCAA mentioned with Tark" include 1 and 2 statements from Tarkanian family members that ware not shown in the body of the table

Assessing the effects of pretrial publicity: Findings from field and laboratory studies

Prior Published Research

Researchers have traditionally adopted one of two approaches for studying the influence of pretrial publicity (PTP) on jury decisionmaking: field survey and experimental methodology (Kerr, 1994, Linz and Penrod, 1992). This section summarizes research findings using each of these methodological approaches to understanding the effects of PTP and links those findings to the PTP content analysis and public opinion survey results.

Field Surveys

A number of studies have employed survey methods to assess the level of prejudgment in potential jurors for actual cases – primarily in criminal cases. These studies are often used to support a motion for a change of venue (e.g., Vidmar and Judson, 1981) which can be an effective solution to the problems of PTP. For example, Nietzel and Dillehay (1983) provide the results of surveys for five murder trials. For all five cases they found that a far greater percentage of respondents in the venue counties had heard or read about the case than those in other counties (with differences of 40% to 90% in the proportion of respondents reporting some knowledge of cases in venue as opposed to alternative counties). The respondents in the venues where the cases were scheduled for trial were more likely to know details about the case, including inadmissible information, and were more likely to believe defendants were guilty (with differences ranging from 16% to 40%). These results clearly suggest that

the possibility of bias would be greater in the venue counties than in other counties.

Similar results were obtained by Simon and Eimermann (1971) who conducted a telephone survey of 130 potential jurors in a community a week before a heavily publicized murder trial. During the two months that passed between the murder and the survey, 25 articles appeared in local newspapers. A majority of those surveyed had read or heard about the case and could supply details about the crime. Members of this group were more likely to describe their current feelings about the case as pro-prosecution (65% versus 41% in the non-exposed group). They also were less likely to think that the defendants could receive a fair trial. Though members of the PTP exposed group believed they personally could hear the evidence with an open mind, they were less than willing to be tried by a jury in the same frame of mind as their own.

Costantini and King (1980/1981) surveyed jury eligible adults concerning their general attitudes toward crime and punishment, their social background, their exposure to PTP, and their level of prejudgment. In each of these cases, Costantini and King found a strong relationship between the amount of information a subject could supply for a case and the measures of prejudice. Respondents were asked to indicate whether they had formed an opinion about the defendants guilt in the cases. These were correlated with several variables including general attitudes about crime, gender, educational level, and knowledge about the specific case.

Although the results suggested that each of these variables was a significant indicator of the respondents' tendencies to presume defendant guilt, by far the best predictor was knowledge about the case – most of which was presumably gained through newspaper and television PTP. Indeed, the more media sources the respondent mentioned attending to, the more he or she knew about the case. Respondents with greater knowledge about a case were found to be more pro-prosecution. Costantini and King concluded from these results that pretrial knowledge was the best predictor of prejudgment.

More recently Moran and Cutler (1991) asked potential jurors for two separate cases about their knowledge of the case, attitudes toward crime generally, and about the case in particular. Once again, pretrial knowledge of the case was related to prejudgment about the case. Notably, however, subjects' knowledge of the case was not correlated with their self-reported ability to be impartial. Moran and Cutler concluded from these findings that PTP may prejudice a potential juror, and that the courts should not accept juror's assertions of impartiality in cases where PTP is a problem.

The Survey in the Present Case

Surveys such as these clearly parallel the methods and results of the survey of Reno and Las Vegas residents conducted by Professor Tedin in the present case. His findings with respect to differences in knowledge about the facts and allegations in the present case parallel the findings from the published surveys:

RESPONDENTS WHO:	Reno	Las Vegas
Recalled the name of Jerry Tarkanian	40%	72%
Heard a lot about Jerry Tarkanian	36%	69%

In addition, the results parallel other studies in terms of the inferences residents have drawn about the parties:

	Reno	Las Vegas
Tarkanian . . . broke too many rules (strongly **disagree**)	06%	19%
NCAA case is in good faith (strongly **disagree**)	09%	20%
NCAA has unfairly harassed (strongly **agree**)	08%	20%
NCAA actions done great damage (strongly **agree**)	22%	42%
NCAA out to get Jerry Tarkanian (strongly **agree**)	09%	21%
Tarkanian good for the State (strongly **agree**)	18%	45%
Prefer to see Jerry Tarkanian win this case	26%	58%

Finally, the Tedin survey results parallel the findings from other studies that document the relationship between media exposure and prejudgment. As the following two tables from Dr. Tedin's report indicate, respondents in both Las Vegas and Reno who report closely following media coverage of the events that form the basis of the present suit (or report hearing a lot about Mr. Tarkanian) are much more likely to prefer that Mr. Tarkanian prevail in the present litigation. Of course, more than twice as many respondents in Las Vegas (29%) than in Reno (14%) reported following the events closely and it is therefore not surprising that the relationship between media consumption and prejudgment in favor of

Mr. Tarkanian is less pronounced in Reno than in Las Vegas.

HOW CLOSELY DID THE RESPONDENT FOLLOW MEDIA COVERAGE?

LAS VEGAS

Preference	Did not Follow	Followed, not closely	Followed closely
Prefer Tarkanian	23%	54%	73%
Unsure	65	31	09
Prefer NCAA	12	15	18
	100%	100%	100%

RENO

Preference	Did not Follow	Followed, not closely	Followed closely
Prefer Tarkanian	21%	33%	54%
Unsure	63	41	22
Prefer NCAA	16	26	24
	100%	100%	100%

HOW MUCH HAVE YOU HEARD ABOUT JERRY TARKANIAN?

LAS VEGAS

Preference	Nothing/ A Little	Some-thing	A lot
Prefer Tarkanian	24%	44%	61%
Unsure	65	37	24
Prefer NCAA	11	19	16
	100%	100%	100%

RENO

Preference	Nothing/ A Little	Some-thing	A lot
Prefer Tarkanian	24%	28%	40%
Unsure	59	46	36
Prefer NCAA	17	26	24
	100%	100%	100%

Experimental Studies

The second approach to studying the link between PTP and jury decision making involves the use of jury simulations. Of course, the most direct way to test PTP effects would be to associate the occurrence of PTP with actual jury verdicts – is the conviction rate higher in cases receiving prejudicial PTP? The ideal comparison case is the same trial, unchanged in any way except for the presence and absence of PTP. Unfortunately, that ideal cannot be realized in actual jury trials, but it can be

achieved in experimental studies. In laboratory trial simulations, an experimenter can assure that the only difference between two sets of jurors or juries is their exposure to PTP. Because other differences are controlled for, the experimenter can then draw confident conclusions about the impact of such publicity on mock jurors' behavior. The enhanced experimental control available in the laboratory comes at a cost – a laboratory simulation is necessarily artificial. But, despite its artificiality, the findings of experimental simulations illuminate behavior in real trial settings, and a number of studies have determined that the artificialities of the typical trial simulation study generally do not bias verdicts [e.g., Simon and Mahan, (1971); MacCoun and Kerr, (1988); Kramer and Kerr, (1989); Miller, (1975); Stasser, Kerr and Bray, (1982); Kerr, Nerenz and Herrick, (1979)]. For all of these reasons, laboratory research on PTP effects on mock jury behavior is highly relevant to "real-world" courtroom settings.

Experimental studies attempt to approximate the trial experience for mock jurors in a controlled experimental environment. Various methods, ranging from the presentation of actual videotaped trials (Otto, Penrod and Dexter (1994) and simulated trials (e.g., Kramer, Kerr, and Carroll, 1990) to the use of a short written summary of trial proceedings (e.g., Sue, Smith, and Gilbert, 1974), have been used to simulate the trial process. A major advantage of the simulation method is that researchers are able to vary the types and amount of PTP given to subjects in the experiment. Psychologists started the empirical investigation of the effects of PTP effects with categories of information that would most likely be inadmissible as evidence in a jury trial. Consequently, past

convictions for criminal offenses, and confessions of guilt that may later be recanted or held as inadmissible for technical reasons are two types of pretrial information that were examined early by experimenters.

PTP Effects in Criminal Cases

Tans and Chaffee (1966) gave student subjects newspaper stories about crimes varied by, a confession or denial by the suspect, the seriousness of the crime, favorable or unfavorable statements by the district attorney, and defendant release or custody. After reading the stories, participants were asked to evaluate the defendant on several measures including an item assessing guilt. Results indicated the suspect was more likely to be judged guilty when all elements of unfavorable information were presented. The most damaging element was an indication of a confession.

In an unpublished study Wilcox and McCombs (1967) tested the effects of a confession and a prior criminal record in arrest stories on ratings of guilt. Subjects were 120 persons randomly selected from the voter registration list in Los Angeles. The results showed an effect for a confession by the accused.

In a more elaborate study Padawer-Singer and Barton (1975) selected jurors at random from a courthouse and asked them to participate in a jury experiment in which they decided a recorded reenactment of a murder case. Thirty-three "juries" were formed, ten of these read a mock newspaper story stating the suspect had a criminal background and had retracted an alleged confession. The remaining 13 juries were exposed to PTP that did not

mention criminal background or confession. After reading the stories, the jurors listened to a tape recording of an actual murder trial. More than 72 percent of jurors exposed to the stories containing inadmissible information voted to convict, whereas less than 44 percent of the jurors not exposed to this information voted guilty.

Hvistendahl (1979) investigated the impact of identifying a suspect in a news story by four different techniques: a fictional address, race, gang membership, and a prior criminal record. Each factor was placed in the lead in some stories and the conclusion of others. The stories were read by 290 subjects who then assessed the suspects' guilt. The author found no effects for placement but reporting the defendant had a prior criminal record in the story produced significantly more guilty judgments than the name identification condition.

De Luca (1979) administered a survey which contained seven versions of a crime story and questions about the guilt of the suspect named in the story. The story versions included statements indicating that the suspect had a prior arrest record, statements in which the suspect either had or had not made a confession, and information that the suspect passed or failed a lie detector test. These versions were compared to a story that contained none of these elements. The results indicated that each of the factors was significantly related to respondent perceptions of suspect guilt, and that the combination of all three resulted in the highest levels of perceived guilt.

Hoiberg and Stires (1973) tested the effects of heinous and "prejudgment" PTP on mock jury decision making.

Heinous publicity was manipulated by varying the degree to which the case descriptions contained lurid details of crime. Prejudgment publicity was varied by describing evidence which implicated defendant involvement in the crime. The authors found that for females, the likelihood of a guilty verdict was increased by both types of publicity.

In the past few years there has been a renewed research interest in PTP effects. Recently, Otto, Penrod, and Dexter (1994) used a somewhat different experimental procedure in which they explored the differential impact of various types of PTP. Student jurors were presented with one of eight different forms of PTP concerning a defendant who was accused of disorderly conduct in an actual case. The jurors then viewed an edited videotape of the actual trial, and registered their verdict preferences both before and after viewing the trial. Penrod, Otto, and Dexter found that after hearing the trial evidence, the jurors' verdicts were significantly affected by the PTP. The strongest effects were for the negative PTP about the defendant's character. Subjects who saw this type of PTP were more likely to say the defendant was guilty prior to seeing the trial. In addition, both the weak and the strong versions of the PTP containing inadmissible statements by a neighbor of the defendant had a significant impact on subjects' pretrial judgments. The strong version operated in the same way as the character PTP – causing subjects to believe the defendant was guilty.

The results also indicate that consideration of trial evidence did not significantly diminish the impact of PTP. A test of the effect of jury consideration of trial evidence

revealed that evidence reduced (though not to a statistically significant level) the biasing effect of character PTP but evidence had no appreciable impact on the biasing effects of other PTP. This study provides evidence that PTP effects operate both through assessments of the evidence and attributions about the defendant. Each of five tested mediating variables (persuasiveness of the defendant, likability of the defendant, criminality of the defendant, strength of the prosecution case, and sympathy for the defendant) were directly related to final verdicts. Character PTP, as well as both forms of the inadmissible statements, influenced subjects' pretrial judgments of the guilt of the defendant. This pretrial judgment had an influence on subjects' assessments of the strength of the prosecution case, and their sympathy for the defendant, both of which were related to final judgments of the defendant's guilt.

In another study Penrod, Otto, and Dexter (1990) employed a criminal case arising from a very well-publicized racial incident involving members of two campus fraternities. The researchers first assessed subjects' exposure to PTP (e.g., by testing the recognition of newspaper headlines) and the inferences and judgments subjects had made about the case. Subjects were then presented a "preenacted" videotaped trail built around the facts of the case. The videotape was prepared in advance of the actual trial (which was never held due to pre-trial settlements and dropping of charges), but was based on actual statements made by witnesses and defendants. After viewing the trial, subjects' verdict preferences and other judgments were measured. Assessments of mock jurors'

pre-trial knowledge revealed high levels of case awareness and well-structured attitudes about fraternities, ethnic jokes and racial slurs, drinking, and personal experiences with fraternities. Dependent measures assessed such matters as the defendant's culpability, strength of the defense and prosecution evidence, assessment of a self-defense claim, injury to the victim, and identification with the defendant. There were relationships among measures of PTP recall, measures of bias in recall, a number of pre-trial attitudes (e.g., attitudes about fraternities), and the ratings of the defendant's culpability.

In a recent study by Dexter, Cutler, and Moran (1992), subjects received a packet of fictionalized newspaper stories one week prior to their participation in the study. They then viewed a videotape of a reenacted trial based on a murder case. In this instance PTP increased conviction rates. Extended voir dire did not serve to reduce the negative impact of PTP.

The most ambitious investigation of PTP, a study by Kramer, Kerr, and Carroll (1990) gave subjects either factual or emotional publicity and had them view a 51-minute reenactment of an actual trial. Differences across the PTP conditions emerged after deliberation. The analysis of deliberations suggested that PTP increased the persuasiveness of jurors who argued to convict. Judicial instructions were ineffective at reducing this impact of PTP. Continuance was effective as a remedy only for factual publicity – it had no impact on the judgments of subjects who read the emotional PTP.

PTP Effects in Civil Cases

Unfortunately, there have been only a few empirical studies of the effects of PTP on jurors in a civil trial. In an early instance, Kline and Jess (1966) conducted a mock jury study with 48 (4 "juries") college age students to examine the effects of reports of past conviction records on juror prejudice in a civil trial. The prejudicial and nonprejudicial statements were embedded in a specially constructed newspaper article and television newscast. Subjects read and heard about a traffic accident in which there was a personal injury. One version of the story included a report of past arrests for drunken and reckless driving, the other version did not include reports of past incidents. Examination of the statements made by student-jurors during their deliberations indicated that one out of the four juries referred to the past record despite the judge's instructions to the contrary.

Tanford and Cox (1988), however, used a civil trial in which they varied whether or not subjects saw evidence about a party's prior record or bad character introduced for the purpose of assessing credibility, but not liability. Subjects who saw this limited use evidence were more likely to find the defendant liable, as well as make attributions of the harmfulness of the defendant, and the likelihood he would be involved in future negligent behavior. Such attributions about the defendant were not legally appropriate with this limited use evidence.

Otto, Penrod, and Hirt (1990) drew upon an actual case to examine the possible effects of PTP on juror decisionmaking in a civil trial. The trial was an edited videotape of a two-day trial of a claim for a personal

injury award arising from a automobile/pedestrian accident. Student subjects viewed the trial after reading one of several different combinations of PTP concerning the defendant and the plaintiff. The "newspaper articles" included negative hearsay statements, statements about prior police involvements, or neutral information about the two parties. The PTP influenced not only the judgments of negligence, but also impressions of the parties, memory, and inferences from the trial – all of which were examined as possible mediators of the PTP effects on negligence judgments.

The Otto, Penrod, and Hirt results demonstrated that PTP can affect subjects' judgments of the negligence of the parties in a civil trial. These effects were reflected not only in the subjects' verdicts, but also in verdict confidence, evaluations of the parties, and memory for, and inferences from, the trial evidence. Both the negative character PTP about the plaintiff and the prior record PTP about the plaintiff influenced subjects' judgments of the defendant's negligence. Subjects who read either of these types of PTP about the plaintiff were less likely to say the defendant had been negligent. Subjects who read negative PTP about the plaintiff also gave more positive ratings of the defendant and his witnesses.

"General" PTP Effects

There have also been studies on the effects of "general PTP " – that is, information that is prominently in the news, but not closely related to a particular case (Green and Loftus, 1984). This type of publicity (which arguably characterizes some of the PTP in the present case), unlike

more case specific publicity, may work to either create a favorable bias for a party or prejudice potential jurors against the party's case. Green and Loftus (1984) tested the effects of PTP before and after exposure to highly publicized news stories involving mistaken identifications of innocent people by eyewitnesses. In two experiments, undergraduate subjects who had been familiarized with the high-publicity news stories about mistaken identifications were less likely to convict a defendant in a simulated trial in which eyewitness testimony played a significant role. In one study, three groups of mock jurors were compared: (1) a group that read newspaper articles about a mistakenly identified defendant who was convicted of rape (the miscarriage condition); (2) a group that read other articles describing how eyewitness testimony led to the arrest and conviction of a mass murderer (the heinous crime condition); and (3) a control group exposed to no PTP. All mock jurors then decided a case of armed robbery and murder. The prosecution's case depended on eyewitness testimony. The acquittal rate in the miscarriage condition (57%) was significantly higher than either of the two others (control, 40%; heinous crime, 25%). In a subsequent study, the investigators found that the more similar the publicized case was to the case being tried, the stronger the effects of the general PTP.

Greene (1990) has argued that such media effects are not isolated and juror attitudes and behavior in unrelated cases can be affected by news or entertainment media depictions of courtroom procedures (such as the movie *The Verdict*), of particular classes of witnesses (such as psychiatric testimony), or law enforcement efficiency, of

insurance industry advertising, (Loftus, 1979) and of violent pornography (Linz, Donnerstein and Penrod, 1984).

More recently, Greene and Wade (1988) tested the possibility that publicity about a series of gruesome rapes and murders of elderly women would "harden" jurors in a subsequent simulated jury study. The study was conducted in two phases, first the student jurors were exposed to several unrelated newspaper articles and asked to rate them on dimensions of comprehensibility and interest level. The articles either described a heinous crime or a miscarriage of justice like the case in the Green and Loftus (1984) study. In the second part of the study, subjects participated as mock jurors in a robbery-murder trial and rendered verdicts. Subjects who read the newspaper article about the mistaken identity were less likely to convict the defendant than jurors who read about the series of heinous crimes. A second study demonstrated that this effect is slightly stronger when the simulated case more closely resembles the general PTP.

Summary

The experimental studies, when considered together, offer clear and consistent evidence that PTP has an impact on jury decision making. This conclusion is reinforced by the results of a meta-analysis (a standard method that combines results from a number of studies) by Otto, Penrod, and Gross (1993) on all available published (N=10) and unpublished (N=4) experimental studies of PTP effects. A total of 14 separate studies were used for these analyses. In these 14 studies, there were 36 manipulations of PTP for which 33 provided enough

information to allow calculation of effect sizes. The average effect size for these 33 cases was an *r* of .14. This effect size is significantly different from zero – in other words, the studies, as a group, offer clear evidence that PTP influences subsequent decisionmaking.

It is important to note the experimental studies of PTP effects do not and cannot attain the levels of PTP exposure that is evident in the present case. The PTP biases induced in the experimental studies are typically the product of a few short stories – not a barrage of articles over an extended period of time (seven years) as is true in the present case (nearly two thousand Las Vegas articles over the seven year period).

Alleviating Pretrial Publicity Effects

Granting continuances

Few cases manage to maintain extended public and media attention. It is tempting to conclude that the effects of PTP will dissipate once a case is out of the limelight (assuming it stays out of the limelight). For temporarily spell-binding cases, one potentially effective remedy to PTP is a continuance or delay in the trial date with the hope potential jurors will simply forget the publicity. The recent experimental study by Kramer, Kerr and Carroll (1990) examined publicity that was factually and emotionally biasing. The former consisted of news reports detailing the defendant's previous convictions for armed robbery and the discovery of incriminating evidence at his girlfriend's apartment. The emotionally biasing publicity identified the defendant as a suspect in a fatal hit-and-run of a child involving the same vehicle used in the

robbery. Mock jurors were exposed either to both types of publicity, to only one, or to neither. For half the jurors, this exposure occurred an average of 12 days prior to the trial, simulating a brief continuance. The remaining jurors were exposed to the PTP immediately prior to the trial. Juries exposed to the factual publicity were significantly more likely to convict the defendant than those not exposed when there had been no delay between exposure and trial; but when there had been a delay, factual publicity had no significant effect on conviction rates. Thus, the study offers some support for the effectiveness of a continuance as a means for ameliorating the influence of factually biasing PTP. Of course, in the present case it is clear that residents of Las Vegas (and to a lesser extent, Reno) remember quite a bit about the parties and the case, so the Kramer et al. findings with respect to factual publicity are probably not relevant. On the other hand, it is notable that a strong biasing effect of exposure to the emotionally biasing publicity was not attenuated at all by introducing a delay. It would appear, and Kramer et al. argue, that emotionally laden impressions of parties may be even more durable than the factual information upon which those impressions are formed. In any event, continuances (and perhaps other remedies) may be relatively more effective for factual PTP than for emotionally loaded information. In the present case, it is clear that the sheer volume of PTP to which residents of Las Vegas and Reno have been exposed exceeds by several orders of magnitude the PTP presented to mock jurors in the Kramer et al. study. Indeed, it clearly appears that factual knowledge about and effective reactions to the parties

remain markedly different in Las Vegas and Reno despite the passage of time.

Jury Selection

Based on interviews and surveys of judges and attorneys, it appears that voir dire and judicial admonitions are the most commonly used remedies for prejudicial PTP (Weaver, 1983). This strategy reflects a common belief that an extensive voir dire is effective in identifying and eliminating jurors tainted by exposure to PTP. Of course, in cases such as the present one in which the parties have been the subject of extensive and intense publicity over an extended period of time, it may be difficult to find jurors who have seen or heard nothing about the case, the parties, and the issues. Nevertheless, even if a sufficient number of unexposed jurors cannot be found, it is often assumed that exposed jurors who assert their ability to disregard any PTP can and will do so. Furthermore, preemptory challenges may be used to remove those whose bias does not warrant a challenge for cause. In such cases it is likely that causal challenges will turn upon a juror's own judgment of his or her impartiality. Can assertions of impartiality be trusted? Sue, Smith, and Pedroza (1975) asked mock jurors who had been exposed to PTP the standard question, "Can you, in view of the publicity you have seen, judge the defendant in a fair and unbiased manner?" Those who answered "no" were more likely to find the defendant guilty. But those who answered "yes" were also much more likely to convict than jurors never exposed to PTP (53% guilty versus 23% guilty).

Kerr, Kramer, Carroll, and Alfini (1991) examined the same issue. Mock jurors who had been shown PTP were asked in a simulated voir dire, "Can you put out of your mind any information you might have received from the newspapers or television and decide this case solely upon the evidence to be presented in court?" Responses to this question were unrelated to subsequent verdicts – those who doubted their impartiality were no more or less likely to convict than mock jurors who had no such doubts. In both of these studies, it is unclear whether the jurors were unaware of the biasing effect of the publicity or were simply not admitting a bias. Clearly, jurors' simple assertions of impartiality were not sufficient to identify and eliminate bias due to exposure to PTP.

Do peremptory challenges catch and eliminate jurors who fail to admit or recognize their bias? Research has examined the effectiveness of attorney use of peremptory challenges in cases where PTP is not an issue and there is little evidence that peremptory challenges are reliably related to jurors' verdict preferences (Fulero and Penrod, 1990; Olczak, Kaplan, and Penrod, 1991; Zeisel and Diamond, 1978). Perhaps PTP-induced bias is easier to detect, or perhaps more extensive voir dire may aid attorney effectiveness. In the study by Kramer et al., many of the mock jurors were videotaped as they responded to voir dire questions and these tapes were then mailed to a national sample of experienced defense attorneys, prosecutors, and trial judges. The tapes were accompanied by other information including summaries of the PTP that jurors might have been exposed to, background questionnaires collected by the jury commissioner, and outlines of the prosecution and defense cases. The attorneys and

judges were asked to indicate which prospective jurors they would excuse in their usual professional role in the trial. Judges' causal challenges and defense attorneys' peremptory challenges were not related to jurors' verdicts – excused jurors were no more or less likely to convict than acceptable jurors. Prosecutors did somewhat better in identifying jurors sympathetic to their case. Acceptable jurors exposed to PTP who passed through voir dire were no more or less likely to convict than those who were excused (by anyone) – but both groups were more likely to convict than unexposed jurors. Voir dire had no net effect on the bias of seated jurors.

Lest these results seem a fluke, a study by Dexter, Cutler, and Moran (1992) appears to rest the case. In that study mock jurors exposed (or not exposed) to PTP were subjected to an extensive voir dire (60 minutes) or minimal voir dire (15 minutes) designed to reduce possible juror biases. PTP had an equal effect on both jurors exposed to the minimal and the extended voir dires.

As Carroll et al., (1986) note, the effectiveness of voir dire as a remedy for PTP rests on at least two assumptions: first, that jurors have cognitive access to their source of bias – that they can remember having seen or heard news accounts of the trial accurately; and second, that prospective jurors are willing to report on any bias that may have arisen from exposure to PTP. In light of the research findings, both assumptions appear quite tenuous.

Deliberation

It has been suggested that juries may police themselves during deliberation and if someone starts to discuss anything proscribed by judge's instructions, other jurors will point this out, and steer deliberations back to appropriate matters. This argument suggests that any biasing effect PTP might have on an individual juror will be reduced through the process of jury deliberation. Alternatively, deliberation may have the effect of accentuating any biases jurors bring to the deliberation room. Unfortunately, existing research is most consistent with the accentuation theory – jury deliberation appears to strengthen, not reduce, bias. As noted earlier, Otto, Penrod, and Dexter (1994) found that deliberation did not significantly reduce PTP-induced biases. Similarly, in the Kramer et al. study, the difference in juror conviction rates prior to deliberation was only 5.9 percent for those exposed versus not exposed to PTP; after deliberation the difference for non-hung juries was 43.3%. Rather than remedying the effects of exposure to PTP, deliberation appears to magnify its effect. It appears that the effects of PTP are probably brought to the courtroom, probably persevere, and grow despite the fact that few juries exposed to PTP spend much time discussing the PTP, and mentions of PTP were almost always followed by admonitions from other jurors that such information should not be considered.

Judicial instructions.

In cases with substantial PTP, the judge will often instruct jurors to ignore the publicity. There have been several empirical studies of the effectiveness of this remedy for eliminating juror bias. Simon (1966) provided registered voters in Champaign and Urbana, Illinois with stories about murder. Half of the group read sensational versions of the murder containing gory details and eye catching headlines. The other half were given more conservative versions of the same stories. Subjects were then asked to vote on the guilt or innocence of the suspect described in the story. The results indicated that 67 percent of those who read the sensational stories voted guilty while only 39 percent of those who read the conservative versions did so. Simon then had subjects listen to a tape recording of a condensed version of a trial wherein the judge admonished the jurors to decide the case solely on the evidence presented at trial. This time there were no differences in the percentage of guilty verdicts between the sensational and conservative groups.

Nelson (1973) reported results similar to Simon's in an unpublished dissertation study of sensational news stories. Nelson chose subjects at random from the general juror list of Cache County, Utah, mailed them sensational or non-sensational news stories and later assessed the effects of the stories when the prospective jurors reported to court for the murder case about which they had read. Nelson found, as did Simon (1966), that initially, those who had read the sensational statements were more likely to rate the defendant as guilty than those who had read non-sensational stories, but after an admonition from the

judge those who had read the sensational stories reduced their assessments of guilt.

In contrast to these positive results, Sue, Smith and Gilbert (1974) found that judges instructions did little to mitigate the effects of PTP. These authors systematically varied the following: damaging (a report of a gun found in the suspect's apartment and ballistics tests showing the gun was used in the murder) versus irrelevant PTP; student versus nonstudent sample; and judge's instructions to disregard the PTP or neutral instructions. Subjects in this study read newspaper accounts and read summaries of evidence presented at trial as well as judge's instructions. The results showed no effects for judge's instructions on verdicts, recommendations for sentencing or ratings of the strength of the prosecution and defenses case. Likewise, there were no effects for type of sample on decisionmaking PTP strongly influenced verdicts and ratings of the strength of prosecution arguments, and this was particularly true among women.

In the study by Kramer et al – arguably the best of these studies in terms of its methods, trial materials, PTP, and subjects, half the jurors were given a pattern jury instruction about PTP while the other half was exposed to no mention of PTP, although it did include a standard instruction to disregard anything seen or heard when the court was not in session. Receipt of the PTP instruction did not reduce the biasing effect of exposure to either the factually or emotionally biasing PTP.

In short, the instruction research evidence indicates that reliance on standard PTP instructions as a remedy for exposure to PTP is not warranted.

Summary

In sum, the results of the content analysis in combination with the results of the public opinion survey, when considered in light of the scientific research on the effects of PTP and the inefficacy of traditional legal safeguards clearly establish the following:

1. There has been much more extensive coverage of the events in dispute in this case in Las Vegas than in Reno – articles have appeared at a ratio of four to one and codable statements about the parties and events have appeared at a ratio of five to one. As documented above, the Las Vegas/Reno ratio of coverage on some specific topics is even more pronounced.

2. The balance of coverage in both Las Vegas and in Reno is more favorable to Mr. Tarkanian than to the NCAA, but this imbalance is more pronounced in Las Vegas than in Reno: a). the number of negative statements about the NCAA in Las Vegas (625 statements) is vastly larger than the number of negative statements about Mr. Tarkanian (164 statements), and b). the number of positive Las Vegas statements about Mr. Tarkanian (697 statements) greatly outnumbers the positive statements about the NCAA (438 statements). The disparities in numbers of statements in Reno are much smaller.

3. The public opinion survey clearly demonstrates that the elevated levels of Las Vegas coverage are associated with much more sympathy for Mr. Tarkanian and a stronger pattern of prejudgment in favor of Mr. Tarkanian in Las Vegas than in Reno.

4. These patterns of media exposure and prejudgment will bias prospective Las Vegas jurors in favor of Mr. Tarkanian and there is a reasonable likelihood that a impartial trial cannot be held in Las Vegas.

5. Traditional safeguards against the biasing effects of PTP and prejudgment (continuances, extended voir dire, jury deliberations, and judicial admonitions) are unlikely to reduce the effects of media-induced biases and may actually aggravate the effects of PTP.

6. A change of venue to Reno is the course of action that is most likely to place the parties on an even playing field.

/s/ Steven D. Penrod

Steven D. Penrod, JD, PhD

STATE OF NEBRASKA)
)
COUNTY OF LANCASTER)

SWORN TO SUBSCRIBED before me this 18th day of March, 1996 by /s/ Steven D. Penrod

(SEAL)

/s/ Rebecca L. Barnes

Notary Public

(2)

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No. 97-659

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
S. DAVID BERST AND ROBERT L. STROUP, III,
Petitioners,

vs.

JERRY TARKANIAN and LOIS TARKANIAN,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents Jerry Tarkanian and Lois Tarkanian respectfully request that this Court deny the petition for writ of certiorari, seeking review of the decision of the Supreme Court of Nevada entered on May 22, 1997. That decision is reported at 939 P.2d 1049 (1997).

STATEMENT OF FACTS

On November 30, 1992, Coach Tarkanian and his wife, Lois, filed a complaint against the Petitioners, the National Collegiate Athletic Association, S. David Berst, and Robert L. Stroup, III, in the district court of Clark County, Nevada. Four years after the Tarkanians filed their case against the Petitioners, and two months before trial, the Petitioners filed a motion to transfer venue out of Clark County. The motion was filed pursuant to the Nevada state statute dealing with transfer of venue, Nevada Revised Statutes section 13.050(2)(b). That statute states that the district court may change the place of trial when there is reason to believe that an impartial trial cannot be had therein. In their motion, the Petitioners complained for the first time in four years that they believed they could not receive a fair trial in Clark County. They argued they could not get an impartial jury in Clark County because of publicity about Coach Tarkanian, the NCAA, and UNLV published from 1986 through 1992.

The district court disagreed with the Petitioners. The district court first held that the Petitioners' motion was untimely because it was based upon facts which were known or should have been known to the Petitioners five years prior when the case was first filed. The district court next found that the amount of media attention that the case had received not only greatly diminished since the time the case was filed, but it literally disappeared. It making this finding, the district court noted that the NCAA's own expert

relied predominantly on media reports from 1986 through 1992 which were four years old. Third, the district court found that the explosive growth of Clark County's population brought huge numbers of people into the County during the previous five years who were completely unfamiliar with this case. Last, the district court noted that this was an appropriate case for a questionnaire which could identify any rabid basketball fans who might be prejudiced against one party or the other. The district court therefore denied the Petitioners' motion to transfer venue because it saw no reason to believe an impartial trial could not be had in Clark County. (Petition, Appendix D, App. 18-19). The Petitioners appealed that order.

On appeal, the Supreme Court of the State of Nevada held that the lower court's decision not to transfer venue out of Clark County was not an abuse of discretion.

First, the state supreme court discussed the expert opinions produced by both sides, and apparently agreed with the opinions made by the Tarkanians' expert, Dr. Robert Tortora. The court noted that the Petitioners' expert analyzed news articles that mentioned UNLV basketball, Tarkanian, or the NCAA which were published in 1992 and earlier, four years prior to the trial date. The court also noted that even though the Petitioners' expert found an additional five hundred articles published between January 1993 and April 1996 that referred to Tarkanian, that expert did not analyze those articles for content. (Petition, Appendix A, App. 5).

The supreme court then discussed the opinion of the Tarkanians' expert, Dr. Tortora. Dr. Tortora is one of the most distinguished statisticians in the world. He is the chief

methodologist of the Gallup Organization. Before joining Gallup, he worked for over twenty years in the Federal Statistical System as a mathematical statistician. Dr. Tortora served in many technical and management positions associated with all aspects of survey design, execution, and research. During his last three years at the United States Census Bureau, he was the Associated Director for Statistical Design, Methodology, and Standards, and had overall methodological responsibility for all the surveys and censuses conducted by the United States Census Bureau. In particular, he led the research program for the largest statistical undertaking in the U.S. -- the year 2000 Census of Population and Housing.

The Nevada Supreme Court recognized the fact that Dr. Tortora criticized the analysis made by Petitioners' experts. Dr. Tortora found that the link between the content of the articles cited by the Petitioners' experts and general attitudes about the target population were unclear. The court also mentioned Dr. Tortora's opinion that there were design flaws in the survey conducted by Petitioners' experts, including the failure to implement procedures to eliminate nonresponse bias. The supreme court reiterated Dr. Tortora's conclusion that "there is no evidence to link the trends in the newspaper articles with the attitudes, opinion, and beliefs of those in [the experts'] survey." (Petition, Appendix A, App. 5).

Second, the state supreme court found that the population of Las Vegas had grown from 858,232 in 1992, the year that the Tarkanians filed their complaint, to 1,028,228 in 1995. The court concluded that a large proportion of the potential jury pool was not exposed to the articles analyzed by the Petitioners' experts. (Petition, Appendix A, App. 5).

Third, the supreme court noted that with scant few exceptions, the newspaper quotations the Petitioners characterized as inflammatory were published several years before the May 1996 trial date. The court found that the Petitioners failed to show that the Clark County jury pool was likely to have read those statements or shared in their sentiments. (Petition, Appendix A, App. 5).

The Nevada Supreme Court concluded that the substantial evidence in the record supported the trial court's ruling not to transfer venue from Clark County. The court held that the trial court did not manifestly abuse its discretion in denying the Petitioners' motion for change of venue. (Petition, Appendix A, App. 6).

REASONS WHY THE PETITION SHOULD BE DENIED

I. The First Question Presented In The Petition Was Neither Raised Before, Nor Decided By, The Supreme Court of Nevada.

Petitioners' first question presented is whether a defendant in a civil case has a fundamental due process right to an impartial factfinder. The Supreme Court of Nevada never decided this issue. In fact, the Petitioners never raised this as an issue to be decided by the Nevada state courts. Therefore, as discussed below, this Court does not have the jurisdiction to hear this issue.

Section 1257(a) of Title 28 of the United States Code sets forth the law regarding the United States Supreme

Court's certiorari jurisdiction over state court decisions. That section provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a). Thus, this Court has no jurisdiction to review a state judgment, except where a federal question is involved.

The Supreme Court stated:

> It is well settled that this Court will not review a final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." . . . When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the

> state courts, unless the aggrieved party in this Court can affirmatively show the contrary."

Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 538, 550 (1987); *see also Exxon Corp. v. Eagerton*, 462 U.S. 176, 180-81 n.3, 103 S. Ct. 2296, 2300-01 n.3 (1983).

In this case, the Nevada Supreme Court did not reach any decision regarding "the fundamental due process rights of a civil defendant to an impartial factfinder." (Petition, Appendix A). Instead, the state supreme court decided that the trial court did not abuse its discretion in finding that the Petitioners could get a fair trial in Clark County. Nowhere in the decision did the state court mention the "United States Constitution" or "due process rights." Because the Nevada Supreme Court did not decide the issue of whether a defendant has certain due process rights, this Court has no jurisdiction to hear that issue now.

The Petitioners did state in their brief to the Nevada Supreme Court a general rule that a fair trial is a basic requirement of due process. However, that was not an issue that the Petitioners asked the Nevada Supreme Court to decide. Instead, the only issue before that court was whether the trial court errored in refusing to transfer venue out of Clark County. In conclusion, this Court has no jurisdiction to hear the first question presented because it was not raised before, nor decided by, the state court.

II. The Second Question Presented Was Decided By The Nevada Supreme Court On Independent And Adequate State Grounds.

Petitioners argue that this Court should review the Nevada Supreme Court decision denying their motion to change venue on the ground that there is a split of authority in the state and lower federal courts regarding the appropriate level of appellate review for a venue order. Petitioners completely ignore the fact that the Nevada Supreme Court decided this issue on independent and adequate state grounds, thus barring review by this Court.

The United States Supreme Court should not consider state decisions which are based upon independent and adequate state grounds:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds (citations omitted). The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. *Our only power over state judgments is to correct them to the extent they incorrectly adjudge federal rights.* And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal

> laws, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-26, 65 S. Ct. 459, 463 (1945) (emphasis added).

In Nevada, a trial court has the discretion to grant or deny a motion to change venue under Nevada Revised Statute section 13.050. Specifically, section 13.050 states, "The court may, on motion, change the place of trial . . . . (b) when there is reason to believe that an impartial trial cannot be had therein." Nev. Rev. Stat. § 13.050(2)(b).

In this case, the Nevada Supreme Court reiterated its state law that an order denying a venue change is reviewed for a manifest abuse of discretion. Specifically, the Nevada Supreme Court held, "This court reviews a trial court's order denying a motion to change venue for a manifest abuse of discretion. *Fabbi v. First Nat'l Bank*, 62 Nev. 405, 414, 153 P.2d 122, 125 (1944), cited in *Pearce v. Boberg*, 87 Nev. 225, 256, 485 P.2d 101, 101 (1971)." (Petition, Appendix A, App. 4). Thus, the Nevada state court never adjudged any federal law when it simply repeated this state standard of review.

In conclusion, the state decision regarding the standard of review was based upon independent and adequate state grounds, and therefore this Court lacks jurisdiction to review that decision.

III. The Second Question Presented Does Not Invoke a Substantial Federal Question.

The Petitioners claim in their second question presented that this Court has jurisdiction to hear the issue of whether the Nevada Supreme Court used the appropriate standard of review in reviewing a lower court's venue order. As discussed below, this Court does not have the authority to hear this issue because it is not a federal question.

This Court only has jurisdiction to hear decisions by state courts which raise federal questions:

> Crucial to the exercise of our certiorari jurisdiction is whether the controlling issue in the state court case is a federal issue, that is, an issue arising under the United States Constitution or under federal laws or treatises. But the fact that a federal question lurks in the case doesn't mean, standing alone, that a state decision will be reviewed. . . . [T]he federal question must be a substantial question.

Justice Brennan, *State Court Decision and the Supreme Court*, 31 Penn. Bar Ass'n Q. 393, 399-400 (1960).

In this case, the Nevada state court reiterated the standard of review in venue transfer cases. (Petition, Appendix A, App. 4). In doing so, the court was only setting forth the state standard of review for a state issue. This decision by the state court was not a "controlling" issue "arising out of the United States Constitution or under the federal law or treatises." A federal law may now be

"lurking" around this case only because Petitioners have tried to interject that argument for the sole purpose establishing jurisdiction by this Court. However, this was not a federal question before the state court, and it is not one now.

In conclusion, the second question does not involve a substantial federal question. This Court, therefore, does not have jurisdiction to hear the issue.

IV. Even If It Did Make An Independent Review Of The Facts,[1] This Court Would Find That Venue Should Not Be Transferred.

A. Any Publicity Relating To This Case Not Only Has Greatly Diminished, It Has Disappeared.

The Petitioners claim that there has been two decades of "torrential and inflammatory" pretrial publicity against the Petitioners and about this case which will prevent the Petitioners from receiving a fair trial in Clark County.

---

[1] In their third question presented, the Petitioners ask this Court to revise the factual and legal conclusions of the Nevada trial and supreme courts. The United States Supreme Court generally will not re-examine a state court's findings and conclusions of fact, unless there are exceptional circumstances that would justify the Court's rejecting the state court's findings. *See, e.g., Lloyd A. Fry Roofing Co. v. Wood, 344 U.S. 157, 160, 73 S. Ct. 204, 206 (1953)* (Court refusing to set aside factual findings of state supreme court that leases where shams because the findings were not without factual foundation). In this case, there is ample factual foundation to support the state courts' decisions, and for that reason alone, this Court should not revise these factual conclusions.

However, the facts show that any publicity regarding this suit has not only diminished, it has literally disappeared.

The studies performed by Petitioners' experts relating to publicity in this case was limited to articles published between the years 1986 and 1992. In the Petitioners' original motion to change venue, their expert, Dr. Steven Penrod, admitted that he analyzed articles published from 1986 through 1992 only. In other words, no analysis was made of articles published for the four year period of time before the trial date of May 28, 1996.

Furthermore, Dr. Penrod never produced the articles which he claimed he analyzed. Therefore, it is impossible to determine whether all of the articles used by Dr. Penrod dealt with this litigation, let alone contained inflammatory comments which would have prejudiced the Petitioners. After all, the only thing that the Petitioners have admitted is that the articles mentioned "Tarkanian, UNLV basketball, or the NCAA." For all the Tarkanians know, the so-called pervasive publicity which the Petitioners' claim they were damaged by could relate to anything from UNLV basketball scores, to Coach Tarkanian's health, to the NCAA's national basketball tournament. Therefore, it is doubtful that there was "pervasive, inflammatory media reports" about the Petitioners from 1986 through 1992.

Moreover, a good number of the reports cited by the Petitioners do not even deal with them. For example, in their brief before the Nevada Supreme Court, the Petitioners argue that "recent newspaper editorials have even stated that the NCAA will 'never be forgiven' because it 'robbed' the Las Vegas community of the 'good fellowship and togetherness that supporting the [UNLV] Rebels brought.'"

(emphasis added). However, The article does not accuse the NCAA of somehow robbing the Las Vegas community. In fact, the NCAA is not even mentioned in the article. This is just one example of how the Petitioners improperly extrapolate from these news articles in claiming that they are the target of inflammatory comments.

Additionally, the Petitioners have no evidence that there existed pervasive inflammatory reports about the Petitioners after 1992. In fact, Dr. Penrod admitted that his media analysis was limited to the years 1986 through 1992, and not beyond those years. Specifically, Dr. Penrod stated that "that time frame was selected because it covers the primary years in which the alleged tortious acts took place -- the plaintiffs would no doubt challenge subsequent coverage as being largely irrelevant to the issues in dispute." Therefore, the Petitioners' own expert tacitly admits that any media reports published after 1992 really had nothing to do with the issues in this case, and therefore, were irrelevant to the issues in dispute. If there had been a deluge of Las Vegas articles relating to this case, Dr. Penrod certainly would have included them in his analysis to show that prejudicial publicity against the Petitioners continued until the trial date.

Dr. Penrod did state in his affidavit that he performed a Westlaw database search of the *Las Vegas Review Journal* by typing in the search, "Jerry /3 Tarkanian." He came up with 500 articles. However, Dr. Penrod did not determine whether those articles discussed the NCAA, and did not conduct any content analysis of those articles. Therefore, those articles could be completely unrelated to the Petitioners and the issues in this case.

The Petitioners did attach to their motion before the district court articles published from 1993 through 1996 which they claimed were so inflammatory and pervasive that current publicity prevented the Petitioners from getting a fair trial in Las Vegas. The articles from 1993 to 1996 totalled twenty-six -- an average of six articles a year. This publicity can hardly be called pervasive.

Moreover, the far majority of the articles which the Petitioners produced as the only evidence of highly prejudicial publicity do not even mention or involve the Petitioners. Out of the twenty-six articles which the Petitioners claim relate to this venue issue, twenty-one do not even mention the Petitioners, or only mention the Petitioners in passing. These twenty-one articles do not contain any information relating to the issues of this case or any inflammatory or highly prejudicial statements about the Petitioners. The remaining five articles published in 1993 and 1994 can hardly be classified as pervasive and highly prejudicial publicity. Therefore, the Petitioners in no way can argue that highly inflammatory statements about Petitioners have been published in numerous articles up until the trial date.

B. The Explosive Growth Of Clark County's Population Brought Huge Numbers Of People Into The County During The Past Five Years Who Are Completely Unfamiliar With This Case.

Before, during, and after the filing of the case, the population of Clark County increased dramatically. In 1986, the population in Clark County was 605,346. By the time the Tarkanians filed their complaint in 1992, the

population had exploded to 858,232. The population continued to grow in dramatic leaps into the year 1995 when the census topped 1,028,228. The population is still growing today. In analyzing these numbers, almost one-half of the population living in Las Vegas today was not even in the County ten years ago.

Dr. Penrod, the Petitioners' publicity expert, claims that the years 1986 through 1992 were the primary years in which the NCAA's alleged tortious acts against the Tarkanians took place. The population of Clark County grew from 605,346 in 1986, to 858,232 in 1992, during the time period the Petitioners say the relevant articles were published. Dr. Penrod tacitly admits that any news articles after 1992 are largely irrelevant to the issues in this case. Afterall, he would have analyzed any articles published up to the time of trial if those articles had been relevant to the case.

After the publication of the articles which the Petitioners claim are so damaging to them, the population in the county grew to 1,028,228. Therefore, the explosive growth of Clark County's population has brought huge numbers of people into the County within the past five years who are completely unfamiliar with the publicity published years ago of which the Petitioners are so concerned.

C. According To The Chief Methodologist For The Gallup Organization, The Petitioners' Expert Reports Do Not Measure The Opinions, Beliefs, Or Attitudes Of Jury Pools From Clark And Washoe Counties.

According to Dr. Robert Tortora, the chief methodologist for the foremost survey organization in the world, the reports prepared by the Petitioners' experts do not accurately reflect the opinions, beliefs, or attitudes about the Petitioners or the Tarkanians held by potential jury pools from Clark and Washoe County.

Dr. Tortora conducted an exhaustive analysis of the survey prepared by Dr. Kent Tedin, one of the Petitioners' experts. Dr. Tortora concluded that the methodology of the Tedin survey -- the manner in which the survey was designed and the method of gathering the data -- is fraught with errors. The totality of design flaws, such as not weighing by the number of residential telephone numbers, the failure to collect demographic characteristics for reducing nonresponse bias, the failure to address such a pertinent and necessary issue as the nonresponse rate in the survey, and the absence of procedures to reduce potential nonresponse bias, indicate serious quality problems in the survey.

Further, in Dr. Tortora's expert opinion, the questions posed in the Tedin survey by their very nature cannot accurately reflect the opinions, beliefs, and attitudes of potential jury pools from Clark and Washoe Counties. Dr. Tortora stated that one can only conclude from the survey that the results represent the 400 respondents in each county. In other words, the survey reflects only what those

interviewed said. The survey is not an accurate estimate of the opinions, beliefs, or attitudes of the target populations in Clark and Washoe Counties.

Dr. Tortora believes that the report of the Petitioners' other expert, Dr. Penrod, is similarly flawed for several reasons. First, Dr. Tortora's finding that the Tedin report is fatally flawed renders the Penrod Report of content analysis utterly irrelevant. Dr. Penrod admits that his analysis is inextricably linked to the accuracy of the Tedin Report. Because the Tedin Report does not accurately reflect the opinions, beliefs, and attitudes of potential jury pools about the Petitioners and the Tarkanians, the Penrod Report which relies on the Tedin Report cannot reflect those opinions, beliefs, and attitudes. Second, assuming for the moment that credence is to be given to content analysis, Dr. Tortora criticizes the fact that the Petitioners' expert failed to examine national print and other local media outlets. Third, Dr. Tortora concludes that there is no evidence to link the trends in the newspaper articles examined in the Penrod Report with the attitudes, opinions, and beliefs with those in the Tedin Report.

According to Dr. Tortora, the only way public opinion may potentially be measured is through a sound survey. The Petitioners' reports fail to do this.

In conclusion, even if this Court were to make an independent review of the facts, it would agree with the Nevada district court and the Nevada Supreme Court that venue cannot be transferred from Clark County.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 97-659

In The

Supreme Court of the United States

October Term, 1997

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, S. DAVID BERST and ROBERT L. STROUP, III,

Petitioners,

vs.

JERRY TARKANIAN and LOIS TARKANIAN,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Nevada

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INTRODUCTION

Respondents' opposition brief is most remarkable for what it does not say. Not one sentence, not one line, not one citation is devoted to challenging the proposition that there is a split of authority in the lower federal and state courts on the federal question whether an appellate court has a constitutional duty to conduct an independent, *de novo* evaluation of a venue ruling when the fundamental right to an impartial factfinder is implicated. Rather, the division of authority in the lower courts is real and substantial, a fact that the NCAA demonstrates in its certiorari petition, and that respondents do not dispute.

As discussed more fully below, instead of addressing the conflict in the lower courts, respondents resort to three essentially jurisdictional arguments, none of which are valid. First, respondents incorrectly contend that the first question the NCAA raises in its certiorari petition – whether there is a fundamental due process right to an impartial factfinder in civil cases – was not raised and preserved below. Second, respondents misunderstand the independent and adequate state ground doctrine, asserting that the doctrine applies to bar review here because the Supreme Court of Nevada used an abuse of discretion standard based on state law when evaluating the trial court's venue ruling in this case. Third, respondents incorrectly argue that there is *no* federal question presented in this case.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE FIRST QUESTION PRESENTED IN THE PETITION IS PROPERLY BEFORE THIS COURT

That the NCAA briefed in the Nevada Supreme Court, and thus preserved, the first question presented in the certiorari petition could not be clearer. The very first sentence of the NCAA's argument section of its opening brief in that court states as follows: "The NCAA's right to an impartial trial is the most fundamental of all constitutional rights." *See* Appendix to Reply Brief (Reply App. A at App. 1). The second sentence quotes this Court's decision in *In re Murchison*, 349 U.S. 133, 136 (1955), which declares that "[a] fair trial in a fair tribunal is a basic requirement of due process." (Reply App. A at App. 1). The NCAA cited several of this Court's precedents involving fair trial issues throughout its brief and argued that the Constitution requires *de novo* appellate review under these circumstances. (*Id.* at App. 1-App. 7). The NCAA continued to press the issue in its reply brief, as well, declaring that "[c]ontrary to Tarkanian's improper assertion, this appeal is about the most fundamental of all constitutional rights – the right to an impartial trial." (Reply App. B at App. 9).

Under clearly established and well-settled principles of this Court's jurisprudence, the questions presented in the NCAA's certiorari petition are properly before the Court. Under 28 U.S.C. § 1257, "[t]he rule now is that a federal claim cannot be considered by the Court unless it has been *either* raised in the state court or considered and resolved by the state court." R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 122 (7th ed. 1993) (and cases cited therein) (hereinafter "*Supreme*

Court Practice") (emphasis original). Thus, the question is not necessarily whether the Supreme Court of Nevada expressly decided the federal issue, but whether the NCAA properly raised and preserved the issue, which it did, as demonstrated above. Moreover, the NCAA's claim of a fundamental constitutional right to an impartial fact-finder necessarily was decided by the Supreme Court of Nevada in adopting a standard of review for the trial court's venue ruling.

Further, a "litigant is not bound to follow any particular form of words or phrases. It is essential only that he bring the federal claim and the grounds therefor to the state court's attention with fair precision." *Id.* at 118. In light of these well-established principles, the first question presented in the NCAA's certiorari petition is properly before this Court.

In any event, it ultimately does not matter whether this Court determines that the NCAA's first question presented was properly preserved as a separate issue. That is, the question whether there is a fundamental right to an impartial factfinder in civil cases is necessarily inherent in the second question presented which was decided below. In other words, the question of what level of appellate review should apply to venue rulings when the right to a fair trial is necessarily implicated, likely will depend on the nature and importance of the underlying federal constitutional right at stake. *See Id.* at 137 (once the Court has exercised jurisdiction over a state court judgment, "the parties may enlarge upon the questions they do present as long as the enlargement may be deemed fairly included or comprised within the stated questions"). Thus, briefing the merits of the level of

appellate review question necessarily will require some attention to the first question presented, and it is only out of an abundance of caution and to fully apprise the Court of the nature of the NCAA's constitutional claim that the NCAA raised the first question as a separate issue.

II. THE NEVADA SUPREME COURT'S JUDGMENT DOES NOT REST ON INDEPENDENT AND ADEQUATE STATE GROUNDS

In this case, the choice of the appellate standard of review of a venue ruling that implicates the constitutional right to a fair and impartial trial is the federal question, and one that the Supreme Court of Nevada necessarily resolved against the NCAA. If the NCAA is correct that federal constitutional principles require *de novo* review, then the Nevada abuse of discretion standard is preempted and cannot constitute an independent and adequate state law basis for the decision. *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985) ("[W]hen resolution of the state procedural law question depends on a federal constitutional ruling, the state law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded").

The independent and adequate state ground doctrine simply does not apply when, as here, the NCAA challenged below – on federal constitutional grounds – the very state law standard the state court applied. *Supreme Court Practice* at 132 (jurisdiction exists when the majority opinion of the state supreme court "explicitly or impliedly recognize[s] the presence of a federal question and render[s] a decision thereon"). Moreover, the dissenting

opinion acknowledges this federal challenge by beginning with a quotation from this Court's decision in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), and refers to "the constitutional dimensions of this case." *See* Pet. App. 7.

III. THE PETITION PRESENTS SUBSTANTIAL, UNRESOLVED FEDERAL QUESTIONS

Respondents' assertion that this case raises no federal questions is simply incorrect, as the opinions of the Supreme Court of Nevada and the NCAA's briefs filed in that court document. Essentially, respondents' argument fails for the same reason as the preceding one: in selecting the appropriate standard of appellate review in this context, the Supreme Court of Nevada necessarily decided a substantial federal question, one that has divided the lower federal and state courts. The standard of review issue is "more than a formal" federal question; it is "not so absolutely devoid of merit as to be frivolous" nor is it "explicitly foreclosed by prior decisions of the Supreme Court". *Supreme Court Practice* at 117.

IV. RESPONDENTS' ARGUMENTS ON THE MERITS ARE IRRELEVANT TO THE QUESTION WHETHER THIS CASE MERITS AN EXERCISE OF THE COURT'S PLENARY REVIEW

Finally, respondents make a misplaced effort to argue the merits of the underlying venue motion at the certiorari stage of this case, relying heavily on disputed facts that are not documented in the opposition brief. A brief in opposition should present arguments for denying the petition, including addressing "perceived misstatement

of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Sup. Ct. R. 15(2); *see also, Supreme Court Practice* at 193. Respondents do not raise any perceived misstatement of fact or law. Rather, they present their interpretation of the factual record in support of their position for denial of the NCAA's change of venue motion.

Respondents argue facts and evidence not in the record before the Court. Respondents' argument to deny certiorari based upon their version of the underlying factual record is misplaced, especially in light of their failure to document many of the "facts" on which they rely. *See, Supreme Court Practice* at 352 (although the Court's rules do not require record cites at the certiorari stage, nevertheless "for the facts that are critical or disputed references to the record below can and should be supplied").

Finally, the decision on whether to grant or deny the NCAA's change of venue motion is not as one-sided as respondents would suggest. Because a majority of the Supreme Court of Nevada adopted an abuse of discretion standard, the outcome was obvious. The dissenting opinion, however, shows that the outcome might well have been different had an independent, *de novo* review occurred.

CONCLUSION

Petitioners respectfully request that this Court grant the petition for a writ of certiorari and set this case for plenary review.

Respectfully submitted,

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APPENDIX A

Excerpt from Appellants' Consolidated Opening Brief in the Supreme Court of the State of Nevada, pp. 23-28.

* * *

ARGUMENT

I. STANDARD OF REVIEW

A. The Right To An Impartial Trial Is The Most Vital Of All Constitutional Rights

The NCAA's right to an impartial trial is the most fundamental of all constitutional rights. *See, Williams v. Chrans*, 945 F.2d 926, 945 (7th Cir. 1991), quoting, *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1111 S.Ct. 2720, 2745 (1991); *Bailey v. Systems Innovation, Inc.*, 852 F.2d 93, 98 (3rd Cir. 1988), citing, *Nebraska Press Association v. Stuart*, 427 U.S. 539, 550, 96 S.Ct. 2791 (1976). "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625 (1955). It is "abundantly clear that fairness in a jury trial, whether criminal or civil in nature, is a vital constitutional right." *Bailey*, 852 F.2d at 98. The courts have stated:

> It is fundamental that every litigant who is entitled to a trial by jury is entitled to an impartial jury, free to the furthest extent practicable from extraneous influences that may subvert the fact-finding process.

Haley v. Blue Ridge Transfer Co., Inc., 802 F.2d 1532, 1535 (4th Cir. 1986).

This vital constitutional right is violated where "even the probability of unfairness" exists. *In re Murchison*, 349 U.S. at 136. "Because **even a single partial juror violates a defendant's constitutional right**, a judge must always act to diligently preserve that right." *United States v. Angulo*, 4 F.3d 843, 848 (9th Cir.1993) (emphasis added).

B. A Change Of Venue Must Be Granted Where There Is A Reasonable Likelihood Of Bias

A change of venue must be granted where, due to local prejudice, there is a "reasonable likelihood" that an impartial trial cannot be held. NRS 13.050 (2); *see also, e.g., Sheppard v. Maxwell*, 384 U.S. 333, 363, 86 S.Ct. 1507, 1522; *Martinez. v. Superior Court*, 629 P.2d at 503. **"[T]he phrase 'reasonable likelihood' denotes a lesser standard of proof than 'more probable than not.' "** *People v. Williams*, 774 P.2d 146, 153 (Cal. 1989), quoting, *Martinez*, 629 P.2d at 503.

A change of venue is designed "to prevent even the probability of unfairness" which results from pretrial publicity and which "tempts" the average juror "to forget the burden of proof" which is applicable in a given case. *Estes v. Texas*, 381 U.S. 532, 543, 85 S.Ct. 1628, 1633 (1965); *Sheppard*, 384 U.S. at 352, 86 S.Ct. at 1517. The courts have stated:

> The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and **not by any outside influence, whether private talk or public print.**

Sheppard, 384 U.S. at 351 (emphasis added).

> **Legal trials are not like elections,** to be won through the use of the meeting-hall, the radio, and the newspaper.

Gentile, 501 U.S. at 1070 (emphasis added.)

A change of venue must therefore be granted where pretrial publicity has created a "probability of unfairness." *Estes,* 381 U.S. at 543, 85 S.Ct. at 1633. This probability may be established by public opinion surveys (*Martinez,* 629 P.2d at 503; *Maine v. Superior Court,* 438 P.2d 372, 377 (Cal. 1968)), or by examining the content of inflammatory pretrial publicity. *People v. Hamilton,* 774 P.2d 730, 737-38 (Cal.1989). Actual bias need not be proved. *Maine,* 438 P.2d at 377. The *Estes* court stated:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But **our system of law has always endeavored to prevent even the probability of unfairness. . . .** To perform its high function in the best way **"justice must satisfy the appearance of justice."**

Id. (citations omitted) (emphasis added).

The law is sympathetic toward granting a change of venue where pretrial publicity has promoted widespread bias in the community. *Maine,* 438 P.2d at 377; *Tidwell,* 473 P.2d at 753.

> "[The defendant expresses] **grave doubt that jurors who are subjected to pretrial publicity seriously adverse to a defendant's interests can efface it altogether from their conscious and unconscious minds,** no matter how hard they try to do so. The law must be sympathetic to

> that viewpoint, and must make that sympathy meaningful in a practical world of public trials." (citation omitted). In many cases that are the focus of unusual public attention, the effect of the prejudicial pretrial disclosures or **widespread community antagonism can be substantially overcome by a change of venue.**

Maine, 438 P.2d at 377 (emphasis added).

Thus, where extensive and partial pretrial publicity has occurred, the court should not hesitate to grant a venue change.

> **"Why courts should hesitate to grant a change of venue in a proper case, I cannot understand.** . . . Why? [Is] it feared the defendant would escape [liability] if he were allowed a fair trial?"

Tidwell, 473 P.2d at 755, quoting, *People v. Suesser*, 132 Cal. 631, 635, 64 P. 1095, 1097 (emphasis added).

C. The Appellate Court Must Independently Review The Circumstances To Determine Whether There Is A Reasonable Likelihood That Even A Single Juror Will Be Biased

"Appellate tribunals have the duty to make an independent evaluation of the circumstances" when reviewing a change of venue motion. *Sheppard*, 384 U.S. at 362, 86 S.Ct. at 1522. An independent review is required because of the vital constitutional issue at hand, and because of the difficulty of effacing prejudicial publicity from the minds of prospective jurors. *Id.*

In light of this duty to conduct an independent evaluation, there is disagreement regarding the standard of

review on a change of venue issue. Under the traditional view, appellate courts would conduct an independent review of the record to determine whether the trial court abused its discretion in denying the change of venue. *See e.g., State v. Ware*, 338 N.W.2d 707, 713 (Iowa 1983); *cf. Ford v. State*, 102 Nev. 126, 130, 717 P.2d 27, 29 (1986). The court would find an abuse of discretion where the trial court: 1) failed to consider all relevant factors; 2) failed to properly weigh the relevant factors; 3) ignored or failed to consider essential facts or evidence; or 4) rendered a judgment based on erroneous factual or legal premises. *See, e.g., James v. Jacobson*, 6 F.3d 233, 239 (4th Cir.1993); *Jardien v. Winston Network, Inc.*, 888 F.2d 1151, 1159 (7th Cir. 1989); *In re Paoli Railroad Yard*, 585 A.2d 608, 610 (Pa. 1991). In this regard, **an abuse of discretion also occurs where an independent review of the circumstances shows that a real probability of prejudice does, in fact, exist.** *State v. Thompson*, 806 P.2d 1251, 1255 (Wash.1991); *State v. Wood*, 349 N.W.2d 294, 295 (Minn.1984); *cf. State v. Rogers*, 101 Nev. 457, 705 P.2d 664, 668 (1985) (Nevada Supreme Court reversed lower court on issue of impartiality where it found that a probability of prejudice existed).

An increasing number of courts now conduct a complete *de novo* review where the lower court's decision is not based on the testimony of live witnesses but, as in the instant case, is merely based upon the same affidavits and exhibits which are before the appellate court.[13] *See, e.g.,*

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[13] Indeed, some jurisdictions have interpreted *Sheppard* to hold that appellate courts must review the change of venue issue completely *de novo*. *See, e.g., Maine*, 438 P.2d 372 (Cal.1968).

Olson v. District Court, 271 N.W.2d 574, 579 (N.D.1978); *State v. Moyd*, 619 P.2d 1107, 1109 (Haw.App.1980); *State v. Warwick*, 555 P.2d 1386, 1388 (Wash.1976). These courts have stated that deference should only be given to the lower court's decision where the lower court had the advantage of observing, first hand, the credibility of witnesses or veniremen. *Id.*; *cf.*, *Patton v. Yount*, 467 U.S. 1025, 1038, 104 S.Ct. 2885 (1985).

In this case, the lower court refused to hold an evidentiary hearing to consider the expert testimony regarding the deep and widespread bias in Las Vegas. The NCAA implored the lower court to hold an evidentiary hearing in light of the court's duty to utilize every safeguard to ensure that an impartial trial could be held. 7 ROA 1338. Yet, the lower court refused to utilize this safeguard after Tarkanian voiced his opposition to the hearing. 7 ROA 1296, 1516. Thus, the lower court merely had the same affidavits and exhibits which are now before this Court. Accordingly, there is no legal basis for giving deference to the lower court's ruling. *See*, *Moyd*, 619 P.2d at 1109; *Olson*, 271 N.W.2d at 579 (N.D.1978); *Warwick*, 555 P.2d at 1388; *Patton*, 467 U.S. at 1038. A *de novo* review of this matter is therefore required. *Id.*; *see also*, *Maine*, 438 P.2d 372 (Cal.1968).

The lower court's decision must be reversed regardless of the standard of review adopted by this Court. Indeed, the record shows that, in additional [sic] to making numerous factual and legal errors, the lower court abused its discretion because an independent review of the circumstances overwhelmingly establishes that a real probability of prejudice does, in fact, exist. *See*, *State v.*

Rogers, 705 P.2d at 668; *State v. Thompson*, 806 P.2d at 1255; *State v. Wood*, 349 N.W.2d at 295.

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APPENDIX B

Excerpt from Appellants' Consolidated Reply Brief in the Supreme Court of the State of Nevada, pp. 1-5.

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II. ARGUMENT

A. INTRODUCTION

1. Tarkanian's Brief Fails To Recognize The Vital And Fundamental Constitutional Issue At Hand

Tarkanian's answering brief ignores the constitutional nature of the issue at hand and, instead, attempts to divert this Court's attention by making irresponsible and false accusations regarding the NCAA's motives. *See, Ans.Br.*, pp. 33-34. This diversionary tactic only confirms the legitimacy of the NCAA's appeal. Indeed, Tarkanian has not only exhibited a strategy of improperly influencing the Las Vegas community through inflammatory statements to the local media,[1] but has now attempted to improperly influence this Court by falsely speculating that the NCAA has filed the instant appeal for improper reasons. *Id.* This irresponsible conjecture has no place in appellate briefs. *See, Allianz Insurance Co. v. Gagnon*, 109 Nev. 990, 860 P.2d 720, 725 (1993).[2]

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[1] *See*, Appellants' *Op.Br.*, pp. 9-16.

[2] The NCAA's constitutional right to an impartial trial is gravely endangered not only by the widespread local prejudice, but also by Tarkanian's strategy of improperly appealing to the emotions of the court and the already biased jury pool.

This appeal is about the most fundamental of all constitutional rights – the right to an impartial trial. *See, Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1111 S.Ct. 2720, 2745 (1991); *Nebraska Press Association v. Stuart*, 427 U.S. 539, 550, 96 S.Ct. 2791 (1976). Every litigant is constitutionally entitled to an impartial trial free from "extraneous influences that may subvert the fact-finding process." *Haley v. Blue Ridge Transfer Company, Inc.*, 802 F.2d 1532, 1535 (4th Cir. 1986). The Court "must always act diligently to preserve [this] right." *United States v. Angulo*, 4 F.3d 843, 848 (9th Cir. 1993).

A change of venue must therefore be granted where, due to local prejudice, there is a "reasonable likelihood" that "even a single juror" will be biased. *Sheppard v. Maxwell*, 384 U.S. 333, 363, 86 S.Ct. 1507, 1522 (1966); *Angulo*, 4 F.3d 843, 848 (9th Cir. 1993). "Reasonable likelihood" denotes a standard of proof less than "more probable than not." *Martinez v. Superior Court*, 629 P.2d 502, 503 (Cal. 1981). Indeed, a change of venue must be granted "to prevent even the probability" that local prejudice will influence the average juror's conclusion. *Estes v. Texas*, 381 U.S. 532, 543, 85 S.Ct. 1628, 1633 (1965). The United States Supreme Court has stated:

Tarkanian's counsel has previously been cited for "misconduct" as a result of employing this type of strategy in prior cases. *Las Palmas Associates v. Las Palmas Center Associates*, 235 Cal.App.3d 1220, 1 Cal.Rptr.2d 301 (1992). The *Las Palmas* court held that counsel "blatantly" committed "prejudicial" misconduct as a result of trying to appeal to the emotions of the court by making improper suggestions regarding motives and opposing counsel. *Id.*

> A fair trial in a fair tribunal is a basic requirement of due process. . . . [O]ur system of law has always endeavored to *prevent even the probability of unfairness*. . . . To perform its high function in the best way *"justice must satisfy the appearance of justice."*

Estes, 381 U.S. at 543, 85 S.Ct. at 1633 (emphasis added).

> *Legal trials are not like elections*, to be won through the use of the meeting-hall, the radio, and the newspaper.

Gentile, 501 U.S. at 1070 (emphasis added).

Thus, the Court must not hesitate to grant a change of venue where doubts exist as to impartiality. *People v. Tidwell*, 473 P.2d 753, 755 (Cal. 1990). All doubts regarding impartiality must be resolved in favor of a change of venue. *Martinez v. Superior court*, 629 P.2d 502, 508 (Cal. 1981). It is within this fundamental constitutional framework that the NCAA will address Tarkanian's answering brief.

B. TARKANIAN'S ANSWERING BRIEF IS FRAUGHT WITH ERRORS

Tarkanian's brief is fraught with assertions that are without factual or legal merit. The NCAA will expose each of Tarkanian's erroneous assertions by addressing the factual record and established law. *Tarkanian simply cannot refute the fact that the Las Vegas community is, and has been for many years, highly biased in favor of Tarkanian and against the NCAA.*

1. Tarkanian's Proposed Standard Of Review Is Nonsensical And Legally Unfounded

Tarkanian's answering brief makes the incredulous argument that the standard of review is "manifest abuse of discretion" rather than "abuse of discretion" as set forth by the NCAA. *Ans.Br.*, p. 4. Tarkanian's argument is nonsensical and attempts to make a distinction where no difference exists.

As stated in the NCAA's opening brief, the abuse of discretion standard recognizes that the lower court's abuse can be "manifested" in numerous ways, including: 1) failure to consider all relevant factors; 2) failure to properly weigh the relevant factors; 3) ignoring or failing to consider essential facts or evidence; or 4) rendering a decision on erroneous factual or legal premises. *Op.Br.*, p. 26, *citing, e.g., Jacobson*, 6 F.3d at 239; *Jardien v. Winston Network, Inc.*, 888 F.2d 1151, 1159 (7th Cir. 1989); *see also, Walen v. Hansen*, 933 F.2d 1390, 1394 (8th Cir. 1991). Thus, contrary to Tarkanian's assertion, the phrases "abuse of discretion" and "manifest abuse of discretion" simply refer to the same standard. *See, James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993).

Furthermore, when the constitutional issue of due process and impartiality is involved, the appellate court has a "duty to make an independent evaluation of the circumstances." *Sheppard*, 384 U.S. at 362, 86 S.Ct. at 1522. This Court and other jurisdictions will reverse the lower court's decision where the independent review reveals that a "probability of prejudice" does, in fact, exist. *State v. Rogers*, 101 Nev. 457, 705 P.2d 664, 668 (1985), *citing,*

Crew v. State, 100 Nev. 38, 675 P.2d 986, *citing*, *State v. Wixon*, 631 P.2d 1033, 1037-38 (Wash.App. 1981).[3]

Finally, a *de novo* review is appropriate where, as in this case, the lower court's decision was not based upon the testimony of live expert witnesses but, rather, upon the same affidavits and exhibits which are now before this court. *Olson v. District Court*, 271 N.W.2d 574, 579 (N.D. 1978); *see also*, *People v. Tidwell*, 473 P.2d 748, 753 (Cal. 1970). Specifically:

> [W]here the trial court's determination was not based upon the testimony of live witnesses, but rather upon the same affidavits and exhibits before us on the record, our review, therefore, is in effect *de novo*.

Olson, 271 N.W.2d at 579.

Thus, Tarkanian's standard of review argument is void of legal merit. This is the type of case that warrants *de novo* review. *Id.* Yet, regardless of the standard applied, the lower court must be reversed because it made numerous factual and legal errors. *See*, *Op.Br.*, pp. 28-59. Indeed, an independent review of the circumstances reveals that a "reasonable likelihood" of prejudice does, in fact, exist. *Id.*, pp. 43-55.

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[3] *See also*, *State v. Ward*, 349 N.W.2d 294, 295 (Minn. App. 1984); *State v. Albrecht*, 516 N.W.2d 776, 783-84 (Wisc.App. 1994); *State v. Ware*, 338 N.W.2d 707, 713 (Iowa 1983).